United Nations

Report of the United Nations Commission on International Trade Law

on the work of its twenty-seventh session

31 May-17 June 1994

General Assembly
Official Records • Forty-ninth Session
Supplement No. 17 (A/49/17)

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ISSN 0251-9127

[Original: English]

[15 July 1994]

CONTENTS

Chapter	Paragraphs	Page
INTRODUCTION	1 - 2	1
I. ORGANIZATION OF THE SESSION	3 - 10	2
A. Opening of the session	3	2
B. Membership and attendance	4 - 7	2
C. Election of officers	8	3
D. Agenda	9	3
E. Adoption of the report	10	4
II. DRAFT UNCITRAL MODEL LAW ON PROCUREMENT OF GOODS, CONSTRUCTION AND SERVICES	11 - 110	5
A. Introduction	11 - 13	5
B. Discussion of articles	14 - 89	6
C. Report of the drafting group	90 - 96	20
D. Adoption of the Model Law and recommendation	97	21
E. Discussion of the draft Guide to Enactment	98 - 110	22
III. INTERNATIONAL COMMERCIAL ARBITRATION	111 - 195	25
A. Introduction	111 - 112	25
B. Discussion of draft Guidelines for Preparatory Conferences in Arbitral Proceedings	113 - 193	25
C. Conclusion	194 - 195	37
IV. GUARANTEES AND STAND-BY LETTERS OF CREDIT	196 - 197	38
V. LEGAL ISSUES IN ELECTRONIC DATA INTERCHANGE	198 - 201	39
VI. CASE-LAW ON UNCITRAL TEXTS (CLOUT)	202 - 207	41
A. Introduction	202	41
B. Considerations by the Commission	203 - 207	41

CONTENTS (continued)

Chapter — Paragraphs — Page

VII. FUTURE WORK .... 208 - 229 43

A. Legal aspects of receivables financing .... 208 - 214 43

B. Cross-border insolvency .... 215 - 222 44

C. Build-operate-transfer projects .... 223 - 228 46

D. Implementation of other proposals made at the UNCITRAL Congress 229 47

VIII. ICC UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS (UCP 500) .... 230 - 231 48

IX. TRAINING AND TECHNICAL ASSISTANCE .... 232 - 239 49

X. STATUS AND PROMOTION OF UNCITRAL LEGAL TEXTS .... 240 - 252 51

XI. RELEVANT GENERAL ASSEMBLY RESOLUTIONS AND OTHER BUSINESS .... 253 - 259 54

A. General Assembly resolution on the work of the Commission .... 253 - 255 54

B. Bibliography 256 54

C. Date and place of the twenty-eighth session of the Commission 257 54

D. Sessions of working groups .... 258 - 259 54

Annexes

I. UNCITRAL Model Law on Procurement of Goods, Construction and Services 58

II. List of documents before the Commission at its twenty-seventh session 97

INTRODUCTION

1. The present report of the United Nations Commission on International Trade Law covers the Commission's twenty-seventh session, held in New York from 31 May to 17 June 1994.

2. Pursuant to General Assembly resolution 2205 (XXI) of 17 December 1966, this report is submitted to the Assembly and is also submitted for comments to the United Nations Conference on Trade and Development (UNCTAD).

I. ORGANIZATION OF THE SESSION

A. Opening of the session

3. The United Nations Commission on International Trade Law (UNCITRAL) commenced its twenty-seventh session on 31 May 1994. The session was opened by Mr. Hans Corell, Under-Secretary-General for Legal Affairs, the Legal Counsel.

B. Membership and attendance

4. General Assembly resolution 2205 (XXI) established the Commission with a membership of 29 States, elected by the Assembly. By its resolution 3108 (XXVIII) of 12 December 1973 the General Assembly increased the membership of the Commission from 29 to 36 States. The present members of the Commission, elected on 19 October 1988 and on 4 November 1991, are the following States, whose term of office expires on the last day prior to the beginning of the annual session of the Commission in the year indicated: 1/

> Argentina (1998), Austria (1998), Bulgaria (1995), Cameroon (1995), Canada (1995), Chile (1998), China (1995), Costa Rica (1995), Denmark (1995), Ecuador (1998), Egypt (1995), France (1995), Germany (1995), Hungary (1998), India (1998), Iran (Islamic Republic of) (1998), Italy (1998), Japan (1995), Kenya (1998), Mexico (1995), Morocco (1995), Nigeria (1995), Poland (1998), Russian Federation (1995), Saudi Arabia (1998), Singapore (1995), Slovakia (1998), Spain (1998), Sudan (1998), Thailand (1998), Togo (1995), Uganda (1998), United Kingdom of Great Britain and Northern Ireland (1995), United Republic of Tanzania (1998), United States of America (1998) and Uruguay (1998).

5. With the exception of Costa Rica, all members of the Commission were represented at the session.

6. The session was attended by observers from the following States: Antigua and Barbuda, Australia, Belarus, Belize, Bolivia, Brazil, Colombia, Cyprus, Czech Republic, El Salvador, Finland, Indonesia, Iraq, Jordan, Lebanon, Malta, Myanmar, Pakistan, Panama, Republic of Korea, Romania, South Africa, Sweden, Switzerland, Syrian Arab Republic, Turkey, Ukraine, Viet Nam, Yemen and Zambia.

7. The session was also attended by observers from the following international organizations:

(a) United Nations organs

International Bank for Reconstruction and Development (World Bank)

(b) Intergovernmental organizations

Asian-African Legal Consultative Committee (AALCC)
Inter-American Development Bank
International Institute for the Unification of Private Law (UNIDROIT)
Permanent Court of Arbitration, The Hague

(c) Other international organizations

Cairo Regional Centre for International Commercial Arbitration
Comité Maritime International
Grupo Latinoamericano de Abogados para el Derecho de Comercio Internacional (GRULACI)
INSOL International
International Bar Association (IBA)
International Chamber of Commerce (ICC)
International Council for Commercial Arbitration (ICCA)
International Women's Insolvency & Restructuring Confederation (IWIRC)
The Chartered Institute of Arbitrators
The Law Association for Asia and the Pacific (LAWASIA)

C. Election of officers 2/

8. The Commission elected the following officers:

Chairman: Mr. David Morán Bovio (Spain)

Vice-Chairmen: Mr. Olivér Glatz (Hungary)
Mr. José María Abascal Zamora (Mexico)
Mr. Ahmed Choukri (Morocco)

Rapporteur: Mr. Visoot Tuvayanond (Thailand)

D. Agenda

9. The agenda of the session, as adopted by the Commission at its 520th meeting, on 31 May 1994, was as follows:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. New international economic order: procurement.
5. International commercial arbitration: draft Guidelines for Preparatory Conferences in Arbitral Proceedings.
6. Electronic data interchange.
7. International contract practices: draft Convention on Independent Guarantees and Stand-by Letters of Credit.
8. Case-law on UNCITRAL texts (CLOUT).
9. Future programme of work.
10. ICC Uniform Customs and Practice for Documentary Credits (UCP 500).
11. Status and promotion of UNCITRAL legal texts.

12. Training and assistance.

13. General Assembly resolutions on the work of the Commission.

14. Other business.

15. Date and place of future meetings.

16. Adoption of the report of the Commission.

E. Adoption of the report

10. At its 546th meeting, on 17 June 1994, the Commission adopted the present report by consensus.

II. DRAFT UNCITRAL MODEL LAW ON PROCUREMENT OF GOODS, CONSTRUCTION AND SERVICES

A. Introduction

11. At its twenty-sixth session, in 1993, the Commission adopted the UNCITRAL Model Law on Procurement of Goods and Construction. 3/ At that session, the Commission recalled that a decision had been made to limit work at the initial stage to the formulation of model legislative provisions on procurement of goods and construction. Having completed work on model statutory provisions on procurement of goods and construction, the Commission decided to proceed with the elaboration of model statutory provisions on procurement of services and assigned this work to the Working Group on the New International Economic Order. The Working Group discussed draft model provisions on procurement of services at its sixteenth and seventeenth sessions. The reports of those sessions are contained in documents A/CN.9/389 and A/CN.9/392, the latter containing in its annex the draft text of the Model Law on Procurement of Goods, Construction and Services as agreed on by the Working Group.

12. The Commission noted that the Working Group at its seventeenth session had considered the form that the model statutory provisions on procurement of services should take. It was noted that the Working Group had decided that the provisions should be presented in a consolidated model statute dealing with goods, construction and services, by way of making amendments to the UNCITRAL Model Law on Procurement of Goods and Construction so as to encompass procurement of services. However, in order to limit changes to the existing provisions related to goods and construction, the Working Group decided that those provisions on procurement of services that would provide a separate method of procurement only for services should be included in the Model Law in a separate chapter IV bis. It was further noted that the approach recommended would leave intact the Model Law as it had been adopted by the Commission and recommended by the General Assembly for use by those States that wished to adopt legislation with a scope limited to procurement of goods and construction.

13. Before entering into a substantive discussion of the articles of the draft Model Law, the Commission considered the manner in which it could conduct its deliberations, in particular as regards the concern that the Model Law contained a large number of procurement methods. In that regard, it was pointed out that the Model Law did not, as such, contain an excessive number of methods of procurement since, as explained in the Guide to Enactment (A/CN.9/393, para. 16), the three methods set forth in article 17 were optional and an enacting State might wish not to enact all of them in its law. It was therefore suggested that a better way to proceed would be to consider the amended Model Law on an article-by-article basis, while giving particular attention to the question of the number of methods of procurement in the context of the discussion on article 16. It was further noted that the work at the current session of the Commission was limited to considering only those changes that would need to be made to the Model Law to make it applicable to procurement of services. 4/

B. Discussion of articles

Title of the Model Law

14. The Commission considered the title of the Model Law. There was general agreement that, although a short title such as "UNCITRAL Model Law on Procurement" might have been preferable, it would have the drawback of not being specific as to the exact scope of the Model Law, specificity that would be desirable in view of the continued existence of the UNCITRAL Model Law on Procurement of Goods and Construction. It was suggested that, since the title should reflect the contents of the Model Law, the title proposed in the Working Group draft, "UNCITRAL Model Law on Procurement of Goods, Construction and Services", would be more appropriate as it reflected that the Model Law was a consolidated text dealing with goods, construction and services. Furthermore, it was felt that that title would also have the benefit of signifying the difference in scope between the existing Model Law on Procurement of Goods and Construction and the current Model Law, which contained provisions on procurement of services. A proposal was made to include a footnote in the consolidated text of the Model Law so as clearly to indicate the continued existence and availability of the UNCITRAL Model Law on Procurement and Construction for those States that wished to enact legislation limited to goods and construction. It was also suggested that further clarification on this point could be made in the Guide to Enactment. After deliberation, the Commission decided to maintain the title "UNCITRAL Model Law on Procurement of Goods, Construction and Services" and to insert a footnote to that title as suggested so as to indicate clearly the continued existence of the earlier Model Law.

Preamble

15. The Commission adopted the preamble unchanged.

CHAPTER I. GENERAL PROVISIONS

Article 1. Scope of application

16. The Commission adopted article 1 unchanged.

Article 2. Definitions

17. The Commission adopted the definitions of the terms "procurement" (subparagraph (a)) and "procuring entity" (subparagraph (b)) unchanged.

"goods" (subparagraph (c))

18. A query was raised as to whether, in a procurement contract for the supply of goods, the transport services associated with the delivery of those goods to the procuring entity would be considered as "incidental services". In reply, it was pointed out that this would depend on whether the procurement contract for the supply of the goods also included the transport of the goods. In such a case the transport would be considered as a service incidental to a procurement of goods if the value of the incidental service were less than that of the goods. However, if the contract for the transport of the goods were separate from the contract for the purchase of the goods, the transport would not be

treated as an incidental service. After deliberation, the Commission adopted the definition of "goods" unchanged.

"construction" (subparagraph (d))

19. A proposal was made to delete the definition of the term "construction". In explanation of the proposal, it was stated that the procurement of construction should be treated in the same manner as procurement of services since, in construction, the abilities and qualifications of the supplier or contractor were of crucial significance. It was also pointed out that the procurement of construction was treated in some legal systems as a case of procurement of services. The Commission however noted that the proposal would make changes to the Model Law on Procurement of Goods and Construction as already finalized and adopted. The Commission thus adopted the definition of "construction" unchanged.

"services" (subparagraph (d bis))

20. The Commission transmitted to the drafting group a concern that the text within parentheses at the end of the definition ("the enacting State may specify certain categories of services") might be misinterpreted as a vehicle for excluding certain categories of services from the application of the Model Law. It was also suggested that further clarification might need to be included in this regard in the Guide to Enactment. Subject to the above possible drafting change, the Commission adopted the definition of "services".

21. The Commission adopted the definitions of the terms "supplier or contractor" (subparagraph (e)), "procurement contract" (subparagraph (f)), "tender security" (subparagraph (g)) and "currency" (subparagraph (h)) unchanged.

Article 3. International obligations of this State relating to procurement [and intergovernmental agreements within (this State)]

22. The Commission adopted article 3 unchanged.

Article 4. Procurement regulations

23. The Commission adopted article 4 unchanged, noting a suggestion that examples of issues related to procurement of services that might be addressed in procurement regulations could be usefully mentioned in the Guide to Enactment.

Article 5. Public accessibility of legal texts

24. The Commission adopted article 5 unchanged.

Article 6. Qualifications of suppliers and contractors

25. The concern was expressed that the current formulation of paragraph (6) might lead to unfair results, in that a supplier or contractor could be disqualified for errors that did not affect the substance of a bid and were easily reparable, for example, when one year's financial reports were

inadvertently left out of the bid. In order to alleviate that concern, it was suggested that the criterion for disqualification should be whether the incompleteness or inaccuracy of the information submitted in relation to the qualifications of the supplier or contractor involved the substance of the bid. The prevailing view was that the existing formulation, arrived at after considerable discussion at the last session of the Commission, was preferable. It was noted that a failure to submit financial reports could be remedied under the existing language in the Model Law. After deliberation, the Commission adopted article 6 unchanged.

Article 7. Prequalification proceedings

Paragraph (1)

26. The Commission adopted paragraph (1) and referred to the drafting group a suggestion to add a reference to chapter IV *bis*.

Paragraph (2)

27. The Commission adopted paragraph (2) unchanged.

Paragraph (3)

28. It was suggested that the reference in paragraph (3) (b) (ii) to article 41 *ter* (f) might be redundant, in view of paragraph (3) (a) (iii). The Commission referred the matter to the drafting group. A proposal to delete paragraph (3) (a) (v) on the ground that it put an undue burden on the procuring entity did not receive support. It was noted that the purpose of paragraph (3) (a) (v) was to establish basic transparency and that the provision recognized that the procuring entity could set further requirements that would allow it to eliminate, early in the procurement proceedings, suppliers or contractors that were not suitably qualified to perform the contract. The Commission also affirmed the necessity of including paragraph (3) (b) (ii).

Paragraphs (4) to (8)

29. The Commission adopted paragraphs (4) to (8) unchanged.

Articles 8 to 10

30. The Commission adopted unchanged articles 8 to 10, entitled: Participation by suppliers or contractors; Form of communications; and Rules concerning documentary evidence provided by suppliers and contractors.

Article 11. Record of procurement proceedings

31. It was suggested that it might be useful to require that the procuring entity maintain a record relating to its decision to apply one of the limited solicitation procedures foreseen in article 41 *bis*. A question was raised as to the purpose of the words "or the basis for determining the price" and of the words "if these are known to the procuring entity". As to the first set of words, it was pointed out that the intention was to address the instances in which the procuring entity would have only a basis for determining the price, as, for example, in case a consultant was employed on an hourly basis, rather

than knowing the actual price of the contract. As to the second set of words, it was explained that it was meant to address, for example, the cases in which the procuring entity would not know the price until the evaluation of a supplier or a contractor on the basis of its qualifications, as in the "two-envelope system", a system which would not require the opening of the "price envelope" for those suppliers and contractors whose proposals had been rejected on technical grounds.

Article 11 bis. Rejection of all tenders, proposals, offers or quotations

32. The Commission adopted article 11 bis unchanged.

Article 11 ter. Entry into force of the procurement contract

33. A proposal to add at the end of paragraph (2) the words "or accepted" did not attract support, in particular since transparency required disclosure prior to the preparation and submission of bids.

Article 12. Public notice of procurement contract awards

34. The view was expressed that it might be useful to require that early notice of the procurement proceedings be given, at least in cases of single-source procurement. It was noted that, at the current stage, such notice could only be mentioned in the Guide to Enactment. The concern was raised that setting, in paragraph (3), a monetary-value threshold below which the publication requirement would not apply would make periodic amendment of the Model Law necessary in order to take account of inflation. It was pointed out that this concern could be addressed in the Guide to Enactment, including a recommendation to set the threshold in the procurement regulations, which presumably would be amended more easily. After deliberation, the Commission adopted article 12 unchanged.

Article 13. Inducements from suppliers or contractors

35. The question was raised as to whether the conduct of a former officer or former employee was relevant to the conduct of the procuring entity. In response, it was pointed out that the intention of the Model Law was to address all possible abusive practices, including acts of former officers or employees that might have an impact on the procurement proceedings. It was noted that the reference to both officers and employees was necessary since, for example, a member of the board of a company could be considered an "officer" rather than an "employee". After deliberation, the Commission adopted article 13 unchanged.

Article 14. Rules concerning description of goods, construction or services

36. A number of suggestions were made with regard to article 14. One suggestion was that the words "that create obstacles to participation" should be deleted since they were vague. Another suggestion was that reference to services in the second sentence of paragraph (2) of article 14 was not appropriate since trade marks, brand names, patents and other items referred to

therein were relevant to goods but not to services. After deliberation, the Commission adopted article 14 unchanged.

Article 15. Language

37. The Commission adopted article 15 unchanged.

CHAPTER II. METHODS OF PROCUREMENT AND THEIR CONDITIONS FOR USE

Article 16. Methods of procurement

38. A proposal was made to delete paragraph (3) (b) since, except for tendering and request for proposals for services, the other methods of procurement would not be applicable to procurement of services. In support of the proposal, it was stated that, in practice, procurement of services was carried out by means of either tendering or request for proposals. Furthermore, it was stated that the availability of a multiplicity of methods of procurement for procurement of services might make it difficult for procuring entities to decide which method to use. Along the same lines, a view was expressed that it was incorrect to reverse, in the case of services. the general rule that tendering proceedings should be the preferred method of procurement since it contained the most open and competitive procedures.

39. In response to the above concerns, it was recalled that the Working Group had considered at some length the question of which of the methods available for procurement of goods and construction should also be available for procurement of services. The Working Group had found that the existing approach was a workable compromise, in particular since States might wish not to enact into their law all the procurement methods available for goods and construction. Furthermore, it was pointed out that, in procurement of services, it might be appropriate in some instances to use methods of procurement other than tendering or request for proposals for services. After deliberation, the Commission decided to retain paragraph (3) (b) unchanged. It was also agreed that the Guide to Enactment could further explain the optional nature of some of the methods of procurement.

40. Proposals of a drafting nature were that the word "procedures" in the *chapeau* of paragraph (3) should be replaced by the word "method" and that it should be made clear that, in paragraph (4), the reference to subparagraphs (a) and (b) of paragraph (3) was only a reference to the subparagraphs themselves and not to the *chapeau* of paragraph (3). Referring these proposals to the drafting group for implementation, the Commission adopted article 16.

Articles 17 and 18

41. No comments were made on articles 17 and 18, entitled: Conditions for use of two-stage tendering, request for proposals or competitive negotiation; and Conditions for use of restricted tendering.

Article 19. Conditions for use of request for quotations

42. The concern was noted and referred to the drafting group that, in paragraph (1), the word "provided" was used twice but with different meanings and that this might create uncertainty.

Article 20. Conditions for use of single-source procurement

43. In reference to paragraph (1) (d), it was suggested that the Guide to Enactment could call attention to the possibility of using procurement regulations to guard against abusive resort to single-source procurement in order to maintain standardization.

Articles 21 to 35

44. No comments were made on articles 21 to 35, entitled: Domestic tendering; Procedures for soliciting tenders or applications to prequalify; Contents of invitation to tender and invitation to prequalify; Provision of solicitation documents; Contents of solicitation documents; Clarifications and modifications of solicitation documents; Language of tenders; Submission of tenders; Period of effectiveness of tenders; modification and withdrawal of tenders; Tender securities; Opening of tenders; Examination, evaluation and comparison of tenders; Prohibition of negotiations with suppliers or contractors; and Acceptance of tender and entry into force of the procurement contract.

CHAPTER IV. PROCEDURES FOR PROCUREMENT METHODS OTHER THAN TENDERING

45. It was suggested that the title of chapter IV might need to be adjusted since chapter IV *bis* also contained procedures for a method of procurement "other than tendering". Various suggestions, including using the phrase "alternative methods of procurement", were made and referred to the drafting group.

Articles 36 to 41

46. No comments were made on articles 36 to 41, entitled: Two-stage tendering; Restricted tendering; Request for proposals; Competitive negotiation; Request for quotations; and Single-source procurement.

CHAPTER IV *BIS*. REQUEST FOR PROPOSALS FOR SERVICES

General remarks

47. The question was raised generally as to the advisability of including in the Model Law a special method for procurement of services ("request for proposals for services"), the procedures for which were set forth in chapter IV *bis*, while, in accordance with article 16 (3) (b), also making available for the procurement of services the request for proposals procedures as set forth in article 38. In this connection, it was pointed out that there appeared to be a degree of overlap with regard to the two methods of procurement, as regards, for example, the question of which of the two methods

to use in cases in which the procuring entity was seeking various proposals as to different possible ways of meeting its procurement needs. The view was expressed that therefore, in order to avoid the appearance of complexity and the possibility of confusion, and with a view to giving the clearest possible guidance in particular to States with limited experience in enacting procurement legislation, it would be preferable to forgo, at the least, the applicability to services of the request for proposals procedures under article 38.

48. In pondering the above question, the Commission noted that the Working Group had considered, but had not been in a position to agree on, possible approaches other than the one embodied in the current draft, which made available for the procurement of services not only the procedures in chapter IV bis, but also the other procurement methods, in particular those referred to in article 17. One such alternative approach would have been to incorporate all of the special procedures for services into the existing methods of procurement for goods and construction, without adding a separate method for services. Another approach would have been to add such a separate method and to exclude the availability of the other methods for services, at least the ones set forth in article 17. It was observed in this regard that the lack of unanimity in the deliberations of the Working Group as to which approach to take reflected the fact that different enacting States might make different choices as to the array of procurement methods to be available for the procurement of services. In this light, the Commission was generally agreed that it should be made clear, in a footnote on the face of the Model Law and in the Guide to Enactment, that the Model Law was presenting options to the legislatures of enacting States as regards the methods of procurement to be made available for services and that States might wish not to incorporate all of the optional methods into their legislation.

49. It was also noted that such an approach would be fully in line with the purpose of the Model Law and in line with its relationship with multilateral instruments such as the GATT Agreement on Government Procurement and the procurement directives of the European Union. Those multilateral instruments set forth general principles to be implemented by member States, but it needed to be understood that those States still had to adopt their own national legislation. The Model Law set forth a model for a statute that would be in line with the principles enunciated in those multilateral instruments.

50. There was some hesitation in the Commission to accept the title of chapter IV bis, in view in particular of its similarity to the name of the procurement method under article 38 (Request for proposals), which would lead to confusion. The drafting group was requested to attempt to find an alternative, for example, "special method for procurement of services". The Commission also favourably referred to the drafting group a proposal to relocate chapter IV bis so that it would immediately follow chapter III (Tendering proceedings). It was felt that such a location was more appropriate since the chapter concerned the normal method for procurement of services.

Article 41 bis. Solicitation of proposals

Title

51. It was generally agreed that a more precise title for article 41 bis should be found, in particular one that reflected the element of notice that was central to the provision. The drafting group was requested to identify such a title.

Paragraph (1)

52. A question was raised as to whether paragraph (1) should assume that publication in an official gazette or other official publication would always ensure timely notice, since in some States such publications might appear in print at a point in time after the procurement proceedings had already transpired. A view was also expressed that paragraph (1) should not go into such details as the price, but should touch on the question of the required qualifications of suppliers or contractors. However, the Commission declined to make any alterations in the text of paragraph (1). It was generally felt that the paragraph, which mirrored the analogous provision in the Model Law on Procurement of Goods and Construction, was appropriate.

Paragraph (2)

53. The view was expressed that the obligation of international solicitation imposed by paragraph (2) was onerous for the procuring entity. As had been the case when a similar concern was expressed with respect to the analogous rule in the Model Law on Procurement of Goods and Construction, the prevailing view was that the principle of open competition, and the attendant rule of wide solicitation, was a key element in the type of highly competitive and transparent procurement regime being codified by the Commission. At the same time, it was recognized that that principle would be subject to a degree of exception by virtue of paragraphs (2) and (3), the latter of which the Commission would consider next.

Paragraph (3)

54. At the outset, the Commission was prompted, by a proposal to delete paragraph (3), to consider generally the appropriateness of including exceptions of the type contained in paragraph (3) to the principle of wide solicitation. Concerns that were cited in support of deleting paragraph (3) in its entirety included the fact that paragraph (2) already referred to certain exceptions and that further exceptions would unduly limit the extent of competition achieved by this, the main method for procurement of services. However, the Commission was generally persuaded by countervailing considerations in favour of retaining all or at least parts of paragraph (3). Those considerations revolved around the need for a certain degree of flexibility with regard to the wide solicitation rule, so as to provide enough flexibility to take account of the differing circumstances in enacting States, and thus to avoid steering procuring entities away from chapter IV bis to less competitive procurement methods or encouraging the wholesale exclusion of categories of services from the application of the Model Law. At the same time, there was a general receptivity to ensuring that access to the exceptions was adequately circumscribed by including both a record and an approval requirement with regard to paragraph (3).

Subparagraphs (a) and (b)

55. As regards the detailed provisions of paragraph (3), the Commission affirmed that, whatever its breadth, paragraph (3) should constitute an exception simultaneously to the domestic and international solicitation requirements set forth in paragraphs (1) and (2), since paragraph (3) referred to cases of "direct solicitation". The drafting group was requested to consider whether this point might be made clearer by referring to direct solicitation in the chapeau of paragraph (3).

56. Particular attention was paid by the Commission to the difference in formulation between subparagraph (a), which provided for direct solicitation when the services were only available from a limited number of suppliers or contractors "that are known to the procuring entity", and the analogous provision for restricted tendering (art. 18 (a)). The view was expressed that the latter provision contained no such reference to the knowledge of the procuring entity and might thus be regarded as leaving less room for abuse than subparagraph (a) of the current paragraph (3). While the concern was expressed that the reference to the knowledge of the procuring entity should be retained so as to give an adequate degree of flexibility to the procuring entity, the prevailing view was that the current provision should track the formulation used in article 18 (a).

Subparagraph (c)

57. Differing views were expressed as to whether to retain subparagraph (c), which provided for an exception to wide solicitation where, because of the nature of the services to be procured, economy and efficiency could be promoted only by way of direct solicitation. The concern was voiced that the provision was vague and that referring merely to the "nature of the services" and to "economy and efficiency" would invite exclusion of wide solicitation in precisely the type of cases in which wide solicitation should be promoted. It was further stated that there was no exclusion along the line of subparagraph (c) for restricted tendering and that a sufficient degree of flexibility was afforded by the exceptions in subparagraphs (a) and (b).

58. In support of retaining subparagraph (c), a variety of considerations were referred to, in particular the need to retain an adequate degree of flexibility for the procuring entity to deal with special circumstances that might arise in the procurement of services. It was emphasized that the acceptability of the special method for procurement for services, as well as that of the Model Law as a whole, depended upon there being an appropriate degree of flexibility with regard to the wide solicitation requirement, so as to give adequate weight to economy and efficiency and other interests of the enacting State.

59. The Commission considered a number of proposals aimed at accommodating the various concerns and considerations that had been raised in the debate as to whether to retain subparagraph (c). One set of proposals centred on an attempt to sharpen the provision by making a more specific reference to what should be understood by the reference to the "nature of the services". Proposals in this respect included, for example, to refer to the "professional", "highly complex and specialized", "intellectual" or "confidential" nature of the services. Various possible combinations of those descriptions were considered, including a proposal to list most or all of those factors, a proposal that would have the provision refer only to cases in which there was a need for confidentiality, and a proposal to refer simply to cases in which the nature of the services did not warrant wide solicitation.

60. After considering but failing to agree on a solution based on a modification of the reference to the nature of the services, the Commission agreed that, rather than focusing on a more specific definition of the nature of the services contemplated, a more precise avenue would be to refer to special circumstances that required confidentiality or to requirements based on national interest. The Commission referred that decision to the drafting group for implementation and requested it to consider a proposal to move the reference to economy and efficiency from subparagraph (c) to the chapeau of paragraph (3).

Paragraph (4)

61. The Commission referred to the drafting group a suggestion that paragraph (4) should contain an express reference to the provision of the request for proposals in cases of direct solicitation. The paragraph was otherwise adopted unchanged.

Article 41 ter. Contents of requests for proposals for services

62. A view was expressed that the requirement to furnish all the information set forth in article 41 ter was unduly onerous for the procuring entity. By way of example, it was stated that subparagraphs (d) and (e) referred to information that need not be contained in the request for proposals, that subparagraph (k) required the procuring entity to provide too many details and that subparagraphs (s) and (t) required the procuring entity to provide information about the law whereas the obligation should be on the suppliers and contractors to verify and be aware of the applicable procurement law. It was therefore suggested that some of those subparagraphs could be deleted.

63. In response to the above concerns, it was noted that article 41 ter, which generally tracked a similar provision in chapter III, was aimed at providing a level of transparency and openness equivalent to that provided for in tendering proceedings since chapter IV bis provided the main method for procurement of services. After deliberation, the Commission decided not to delete any of the subparagraphs in article 41 ter.

64. The Commission noted that the proviso "if price is a relevant criterion" at the beginning of subparagraphs (j) and (k), although meant to indicate that price might not be a relevant criterion in some instances in procurement of services, could unduly diminish the significance of price. The Commission agreed that this erroneous impression could be changed by moving the proviso to the end of both subparagraphs and using a formulation such as "unless price is not a relevant criterion". It was further suggested that the Guide to Enactment could indicate the instances in which price might not be a relevant criterion.

65. With regard to subparagraph (n), a query was raised as to whether it was possible to indicate an exchange rate in the request for proposals since exchange rates were subject to fluctuations. In response, it was pointed out that, for purposes of clarity and transparency, it was important to refer to an exchange rate, which could be indicated, for example, as the rate prevailing at a particular financial institution on a particular date.

Article 41 quater. Criteria for the evaluation of proposals

Paragraph (1)

Chapeau

66. A number of concerns were raised with regard to paragraph (1). One concern was that the words "may concern only" would preclude the procuring entity from applying other criteria, such as confidentiality, national interest, transfer of technology and export promotion. In reference to that concern, it was noted that the words "may concern only" were intended to limit the scope of criteria on the basis of which the procuring entity might evaluate proposals, without requiring their use in all cases. At the same time, it was pointed out that the

criteria mentioned above either would fall under the category of criteria listed in subparagraph (d) or could be added in the law of the enacting State.

67. Another concern was that the environmental impact of the proposals was not among the evaluation criteria listed in article 41 quater. In response, it was pointed out that any particular environmental concerns could be accommodated by way of article 41 ter (g) dealing with the description of services. It was suggested that this approach was evident in that the Commission had not included the environmental impact as one of the criteria used in the procurement of goods and construction, despite the fact that goods and construction might well be considered as generally posing a greater risk for the environment than services.

68. Yet another concern was that in the request for proposals the burden to notify suppliers and contractors of the criteria to be used might be excessive for the procuring entity. In response, it was pointed out that notifying the suppliers or contractors of the evaluation criteria was essential for fostering transparency and fairness in competition. In addition, it was stated that methods of procurement other than request for proposals were available for cases in which it would not be possible for the procuring entity to set clearly such evaluation criteria.

69. After deliberation, the Commission adopted the chapeau of paragraph (1) unchanged.

Subparagraph (a)

70. A number of proposals were made with a view to improving the formulation of subparagraph (a): that the word "relevant" should be added before the word "qualifications" (it was pointed out however that while the adjective "relevant" would be applicable to the experience of the suppliers or contractors, it could not apply to reputation and reliability); that the words "in the field of assignment" should be added after the word "experience"; and that the meaning of the reference to "personnel" should be made clearer, since there might be uncertainty, for example, as to the applicability to independent contractors to be engaged by the winning bidder or utilization of personnel who had not been notified to the procuring entity by the winning bidder. The Commission adopted subparagraph (a) and referred the matter of its precise formulation to the drafting group.

Subparagraph (b)

71. The Commission adopted subparagraph (b) unchanged.

Subparagraph (c)

72. The concern was expressed that subparagraph (c) might give the mistaken impression that price was a relevant criterion in most cases, without specifying the ways in which it might be expressed. It was noted that price could not be applied in a traditional manner as a criterion in the procurement of a number of services. After deliberation, the Commission was of the view that the concern was adequately addressed and thus adopted subparagraph (c) unchanged.

Subparagraph (d)

73. A general suggestion was made, and accepted by the Commission, that the drafting group examine the possibility of fully aligning paragraph (d) with

article 32 (4) (c) (iii), in particular as regards the mention of technology transfer, which was lacking in subparagraph (d).

Paragraph (2)

74. It was noted that the application of a margin of preference in favour of domestic contractors as a technique of achieving national economic objectives was generally agreeable. However, a view was expressed that the objectives of that technique could be more appropriately achieved by crediting domestic suppliers or contractors in the procurement proceedings for their knowledge of the region and the language. After deliberation, the Commission adopted paragraph (2) unchanged.

Article 41 quinquies. Clarification and modification of requests for proposals

75. The concern was raised that it might be too onerous for the procuring entity to be required to communicate to all suppliers and contractors the clarifications sought by and given to one or some of them. It was therefore suggested to make such communication of clarifications subject to request. In deciding to retain the provision unchanged, the Commission noted that making such clarifications available to contractors only upon request would not be sufficient since they would have no independent way of finding out that a question had been raised and a clarification had been given.

Article 41 sexies. Selection procedures

76. A suggestion was made that, in order to better differentiate between the three methods of selection set forth in paragraphs (2), (3) and (4) of article 41 sexies, they should be given subtitles or divided into separate articles. While subtitles were objected to as being inconsistent with the current format of the Model Law, interest was expressed in the idea of separate articles. Various proposals were made for titles or headings, all generally aimed at indicating the difference between the three selection methods with regard to negotiations. After deliberation, the Commission requested the drafting group to implement the desire of the Commission to distinguish better the procedures set forth in the three paragraphs in question.

Paragraph (1)

77. A concern was expressed that the current formulation of subparagraph (c) could cause confusion as to whether it referred to the use of panels of experts independent of and external to the procuring entity or the use of experts within the internal staff of the procuring entity. The view was also expressed that the provision should make it clear that panels of experts only had an advisory role in the selection process and that the final responsibility of selection lay with the procuring entity.

78. The Commission noted that the Working Group had considered at some length the question of how to frame the provision on the use of expert panels and had decided not to deal in the Model Law with such issues as the exact manner in which panels could be used. After deliberation the Commission decided to maintain the subparagraph unchanged, subject to a drafting modification to clarify that the reference was to the use of an external panel of experts. It

was also suggested that the Guide to Enactment could provide further guidance on the use of such panels.

Paragraph (2)

79. Concern was expressed that the word "threshold" in subparagraph (a) did not properly capture the intention of the provision, which was to provide the procuring entity with the opportunity to establish a minimum quality and technical level below which proposals would not be considered. It was further suggested that the paragraph could better explain the mechanics of how such a threshold could be established. The latter suggestion was, however, objected to as going in the direction of providing too much guidance on the mechanics of carrying out certain procedures, an approach that the Commission had decided to avoid. After deliberation, the Commission decided to maintain the subparagraph unchanged, subject to a drafting clarification that the term "threshold level" referred to the setting up of a minimum level of quality that proposals would have to attain.

Paragraph (3)

Subparagraph (a)

80. The concern was expressed that subparagraph (a) was unclear since it did not specify the grounds for rejection of proposals. In response, it was pointed out that the understanding of the Working Group at its seventeenth session had been that rejection would be on the basis of a failure to satisfy a basic criterion such as a professional qualification and not necessarily on the basis of a failure to meet a certain threshold. In line with that understanding, the suggestion was made that subparagraph (a) should be amended to read as follows: "If the procuring entity uses the procedure provided for in this paragraph, it shall engage in negotiations with suppliers or contractors who have submitted acceptable proposals and may seek or permit revisions to such proposals, provided that the opportunity to participate in negotiations is extended to all such suppliers or contractors." The view was expressed that the formulation would be acceptable, in particular if it were to refer to "technically acceptable proposals". The clarity of the words "if the procuring entity ... paragraph" in the Arabic text of paragraphs (2), (3) and (4) was questioned. The Commission adopted subparagraph (a) and referred the matter of its exact formulation to the drafting group.

Subparagraphs (b) and (c)

81. A proposal was made to delete subparagraphs (b) and (c) on the grounds that the procuring entity should be entitled to structure the negotiations as it saw fit. However, the prevailing view was that both subparagraphs (b) and (c) should be retained unchanged in the interest of transparency and efficiency and in order to ensure that the evaluation of the technical and other non-price aspects of proposals was a sound one, not affected by the price. The Commission declined to refer explicitly in subparagraph (c) to the "two-envelope system".

Subparagraph (d)

82. The view was expressed that the meaning of the words "best meets the needs of the procuring entity" were not clear. The prevailing view though was that the evaluation criteria set forth in article 41 quater gave a clear indication as to what could be considered as best meeting the needs of the procuring entity. After deliberation, the Commission adopted subparagraph (d) unchanged.

Paragraph (4)

Subparagraphs (a), (b) and (c)

83. The Commission adopted subparagraphs (a), (b) and (c) unchanged.

Subparagraph (d)

84. The concern was expressed that subparagraph (d), requiring the procuring entity to inform suppliers or contractors that they had not attained the required threshold level, was imposing an undue burden on the procuring entity. In response, it was pointed out that this was a requirement of basic fairness to suppliers and contractors, who would be allocating human and other resources, so as to be able to perform if awarded the procurement contract. As an alternative, it was suggested that article 11 should be amended so as to make part of the record which suppliers or contractors met the threshold level and such information could be disclosed upon request. After deliberation, the Commission adopted subparagraph (d) unchanged.

Subparagraph (e)

85. The concern was expressed that the words "if it appears ..." and other elements in the provision introduced some uncertainty and the possibility of arbitrariness. The Commission adopted subparagraph (e) subject to a clearer formulation by the drafting group.

Subparagraph (f)

86. The Commission affirmed that the procuring entity was not permitted to reopen negotiations with suppliers or contractors with whom it had already terminated negotiations, so as to avoid open-ended negotiations since they could lead to abuse and unnecessary delay. The Commission felt that the provision now reflected all the discretion necessary for the procuring entity, and it was suggested that this point should be more clearly reflected in the Guide to Enactment. The Commission adopted subparagraph (f) unchanged.

Article 41 septies. Confidentiality

87. The view was expressed that the article was inappropriate as it denied the procuring entity the opportunity to engage in negotiations with suppliers and contractors since this would involve the exchange of information on the proposals. In response to that view, it was pointed out that the article, which was in line with a similar rule found elsewhere in the Model Law, was important in order to maintain integrity in the procurement proceedings by ensuring that the procuring entity did not utilize the negotiations as a means inappropriately to play the suppliers and contractors against each other. Furthermore, it provided protection to any confidential information that might be contained in the proposals. The Commission therefore adopted article 41 septies unchanged.

Further general remarks concerning chapter IV bis

88. Having completed its review of the procedures involved in the special method of procurement of services, the Commission reviewed further the manner in which the special method should be presented in relation to the other procurement methods in the Model Law. The Commission did not favour a number of suggestions that were put forth, including, for example, deleting

article 16 (3) (b) and the references to services in articles 17 to 20, with an explanation in the Guide of the option to use those methods for services, or deleting chapter IV _bis_ as a whole. The Commission affirmed that the preferable path would be to retain the approach in the existing draft, with a footnote of the type discussed above indicating that the Model Law presented legislatures with a choice as to which procurement methods to incorporate into domestic legislation (see para. 48 above). As to the content of that footnote, the dominant preference in the Commission was for emphasis to be placed on the fact that the Model Law presented two principal methods, along with alternative methods for cases in which the principal methods were inappropriate. It was also widely felt that the footnote should be neutral as regards which combination of methods enacting States should incorporate.

CHAPTER V. REVIEW

89. A view was expressed that certain aspects of the review procedures (articles 42 to 47) were inconsistent with the approaches found in some States and that a number of provisions might be regarded as onerous for the procuring entity. Reference was made in particular to the provisions on suspension of the procurement proceedings, to the various time limitation periods and to the requirement of notice of the review proceedings to all suppliers or contractors. The prevailing view, however, was that the procedures on review should be retained unchanged, subject to the review by the drafting group of the precise formulation of the provisions referring to services in article 42 (2) (a _bis_). It was noted that the current text was otherwise identical to that in the Model Law on Procurement of Goods and Construction. It was further noted that the current draft also included an asterisk footnote recognizing that, because of constitutional or other considerations, States might not see fit to incorporate the articles on review.

C. Report of the drafting group

90. The entire text of the draft Model Law was submitted to a drafting group for implementation of the decisions of the Commission and revision to ensure consistency within the text among the language versions. The Commission, at its 535th and 536th meetings, held on 9 and 10 June 1994, considered the report of the drafting group.

91. A suggestion was made that the title "UNCITRAL Model Law on Procurement of Goods, Construction and Services" did not make it sufficiently clear that the Model Law which had been adopted by the Commission at the twenty-sixth session and which was limited to procurement of goods and construction was still valid. A suggestion to differentiate the two Model Laws by referring to the year of adoption of the latter one was objected to on the basis that, in some jurisdictions, legislation was only dated if it superseded earlier legislation on the same subject, which was not the intention here. After deliberation, the Commission agreed that the footnote to the title should make it clear that the current Model Law did not supersede the earlier Model Law.

92. A query was raised as to why the reference to article 41 _ter_ (f) had been deleted from article 7 (3) (b) (ii). In response, it was pointed out that the deletion was purely a drafting matter since the information referred to in article 41 _ter_ (f) was already required pursuant to article 7 (3) (a) (iii).

93. With regard to the footnote to article 16, the view was expressed that the intention had been to indicate that the enacting State had the option not to extend the methods of procurement set forth in article 17 to procurement of services. It was noted that the footnote as drafted mentioned the availability of the two principal methods of procurement, mentioned that there were alternative methods of procurement and then informed that States might choose not to enact all those methods into their national legislation. It was stated that the footnote dealt with the question of choice of methods of procurement in a very general manner and might lead to uncertainty with regard to choice of procurement methods in the already existing Model Law on Procurement of Goods and Construction, which did not contain a footnote in this regard, although the Guide to Enactment of that Law did refer to options. After deliberation, the Commission agreed that it might be preferable to have a short footnote which would simply indicate that States had the choice not to incorporate all the methods of procurement in their national law. Such a footnote, it was agreed, could then make a reference to the Guide to Enactment, where a more detailed explanation would be found.

94. It was suggested that, with regard to article 41 *bis* (3), the Guide to Enactment should provide further clarification on the mechanics of carrying out direct solicitation and how the procuring entity might deal with unsolicited proposals.

95. The Commission noted that the title of chapter III *bis* ("Special method for procurement of services") might create the misimpression that this method was the only one available for procurement of services. The Commission therefore agreed that a clearer title would be "Principal method for procurement of services".

96. With regard to article 41 *sexies ter* (1), it was proposed that the provision, rather than make a reference to "acceptable proposals", should provide that the procuring entity engage in negotiations with suppliers and contractors that had attained a rating above a "minimum level" similar to that established under the other two selection procedures. This proposal was not accepted, on the basis that it involved a change in substance since no such minimum level had been established for the selection procedure with simultaneous negotiations. The Commission, after deliberation, decided to replace the words "minimum level" with the word "threshold" in articles 41 *sexies bis* and 41 *sexies quater* on the rationale that the words "minimum level" might give the impression that the procuring entity should aim at receiving proposals of minimum quality.

D. Adoption of the Model Law and recommendation

97. The Commission, after consideration of the text of the draft Model Law as revised by the drafting group, 4/ adopted the following decision at its 545th meeting, on 15 June 1994:

"*The United Nations Commission on International Trade Law*,

"*Recalling* its mandate under General Assembly resolution 2205 (XXI) of 17 December 1966 to further the progressive harmonization and unification of the law of international trade, and in that respect to bear in mind the interests of all peoples, and in particular those of developing countries, in the extensive development of international trade, "*Noting* that procurement constitutes a large portion of public expenditure in most States,

"*Recalling* its adoption of the UNCITRAL Model Law on Procurement of Goods and Construction at its twenty-sixth session,

"*Recalling also* its decision at the twenty-sixth session to draw up model legislative provisions on procurement of services while leaving intact the UNCITRAL Model Law on Procurement of Goods and Construction,

"*Noting* that model legislative provisions on procurement of services establishing procedures designed to foster integrity, confidence, fairness and transparency in the procurement process will also promote economy, efficiency and competition in procurement and thus lead to increased economic development,

"*Being of the opinion* that the establishment of model legislative provisions on procurement of services that are acceptable to States with different legal, social and economic systems contributes to the development of harmonious international economic relations,

"*Being convinced* that model legislative provisions on services contained in a consolidated text dealing with procurement of goods, construction and services will significantly assist all States, including developing countries and States whose economies are in transition, in enhancing their existing procurement laws and formulating procurement laws where none presently exist,

"1. *Adopts* the UNCITRAL Model Law on Procurement of Goods, Construction and Services as it appears in annex I to the report of its current session;

"2. *Requests* the Secretary-General to transmit the text of the UNCITRAL Model Law on Procurement of Goods, Construction and Services, together with the Guide to Enactment of the UNCITRAL Model Law on Procurement of Goods, Construction and Services, to Governments and other interested bodies;

"3. *Recommends* that all States give favourable consideration to the UNCITRAL Model Law on Procurement of Goods, Construction and Services when they enact or revise their laws, in view of the desirability of improvement and uniformity of the laws of procurement and the specific needs of procurement practice."

E. Discussion of the draft Guide to Enactment

98. The Commission engaged in a discussion on the draft Guide to Enactment of the Model Law on Goods, Construction and Services on the basis of document A/CN.9/394. It was noted that, although the draft Guide was presented in the form of amendments to the already existing Guide to Enactment of the UNCITRAL Model Law on Procurement of Goods and Construction, the actual intention was not to make amendments to that Guide but to prepare a second document, without disturbing the existing Guide to Enactment.

99. It was suggested that, since the procurement of construction sometimes involved elements in the selection criteria that were similar to those for the

procurement of services, the Guide should indicate that States might wish to consider using the provisions on procurement of services also for procurement of construction. The Commission then turned to a consideration of comments with respect to specific paragraphs of the annex to document A/CN.9/394.

Paragraph 1

100. It was suggested that comment 1 bis should make it clear that at the current session the Commission was not actually amending the UNCITRAL Model Law on Procurement of Goods and Construction, but was in fact adopting a second text dealing with procurement of goods, construction and services.

Paragraph 3

101. It was suggested that the use of the word "commodity" in describing services was open to ambiguity and that a word such as "object" or "item" should be used.

Paragraph 5

102. A suggestion was made that the characterization of the selection procedure set forth in article 41 sexies (12) as "akin to tendering" should be deleted. It was also suggested that, in the last sentence of the paragraph, it should be made clear that, under the selection procedure set forth in article 41 sexies (14), the procuring entity could not go back and reopen negotiations with suppliers and contractors with whom negotiations had been terminated.

Paragraph 12

103. It was suggested that, because of the rather wide definition of services, the Guide should provide some examples of items, in particular real property, whose classification might usefully be clarified in the Model Law.

Paragraph 13

104. It was suggested that, with reference to procurement of services, the Guide should indicate that the procurement regulations could deal with such questions as conflicts of interest.

Paragraph 16

105. It was pointed out that the reference to the information "known" to the procuring entity should focus on those situations where the price of certain proposals would not become revealed before the conclusion of the procurement proceedings.

Paragraph 18

106. It was suggested that the Guide should provide some examples of services that could be procured by means of tendering proceedings. With reference to comment 2, it was suggested that the use of the word "should" in the first sentence might give the erroneous impression that the requirement to keep a record was not mandatory.

Paragraph 21

107. It was suggested that, in comment 1 under article 41 quater, where reference was made to the other articles in the Model Law where similar criteria were listed, there should be specific references to those articles.

108. It was pointed out that, in the last sentence of comment 2 under article 41 sexies, it should be stated that the selection procedures in article 41 sexies (3) and (4) were in fact unlike tendering in that they allowed for negotiations.

109. With regard to comment 5 under article 41 sexies, it was suggested that the restriction on the procuring entity to reopen negotiations should not be cast as making the method of selection less competitive but as meant to provide a certain amount of discipline in the procurement proceedings.

110. Subject to the implementation by the secretariat of the changes necessary in order to reflect the decisions of the Commission on the Model Law, and the other suggestions made by the Commission, the Commission adopted the Guide.

III. INTERNATIONAL COMMERCIAL ARBITRATION

A. Introduction

111. The Commission, at its twenty-sixth session, in 1993, considered a note by the Secretariat entitled "Guidelines for pre-hearing conferences in arbitral proceedings" (A/CN.9/378/Add.2). 5/ The note, observing the useful application of the principle of flexibility and discretion in the conduct of arbitral proceedings, pointed out that in some circumstances that principle might make it difficult for the participants in an arbitration to prepare for the various stages of the arbitral proceedings. In addition, the note described how those difficulties could be avoided by holding at an early stage of arbitral proceedings a "pre-hearing conference" in order to discuss and plan the proceedings. Furthermore, the note suggested that the Commission should prepare guidelines for pre-hearing conferences and gave a tentative outline of topics that might be addressed in such guidelines. The Commission accepted the suggestion and requested the Secretariat to prepare a draft of such guidelines. 6/ The Secretariat in preparing such Guidelines considered that the term "preparatory conferences" was more appropriate than "pre-hearing conferences" because the conferences envisaged might take place at other stages of the arbitral proceedings.

112. At the current session the Commission had before it documents A/CN.9/396 and Add.1, which contained draft Guidelines for Preparatory Conferences in Arbitral Proceedings. (For the conclusion of the discussions, see paras. 194 and 195 below.)

B. Discussion of draft Guidelines for Preparatory Conferences in Arbitral Proceedings

1. Text as a whole

113. There was general support in the Commission for the project of preparing the Guidelines, and the draft as contained in document A/CN.9/396/Add.1 was regarded as a good basis for the discussions. It was considered that the Guidelines would provide welcome assistance to practitioners and would also have a significant educational effect. It was also observed that the Guidelines would be helpful in ad hoc arbitrations as well as arbitrations administered by arbitral institutions.

114. It was considered that the draft text should emphasize that the advisability of holding one or more preparatory conferences and the time of holding such conferences depended on the circumstances of the case. It was considered that wherever in the text reference was made to "a preparatory conference" drafting changes should be made to indicate the possibility of more than one such conference. If such a conference was to be convened, flexibility should be the governing principle in organizing and timing one or more preparatory conferences. It was stressed that the Guidelines should not convey an impression that holding a preparatory conference was a matter of systematic practice, but that it was useful to the extent that savings in costs and time could be achieved. A view was expressed that a preparatory conference might not be useful when the parties demonstrated an uncooperative or confrontational attitude, but another view was that the decision as to whether to hold a conference was to be made by the arbitral tribunal taking into account principally the desirability of promoting efficient arbitral proceedings.

115. It was noted that the topics discussed in chapter III of the draft Guidelines were relevant to planning arbitral proceedings irrespective of whether a special preparatory conference was convened. It was therefore suggested that the focus of the Guidelines might be broadened so that the text would, instead of only presenting the topics on which early procedural decisions might be useful as agenda items for such conferences, deal with those topics in the context of the various possible approaches to planning arbitral proceedings, of which preparatory conferences were a part.

116. It was observed that some issues that might be dealt with at a preparatory conference touched upon substantive, as opposed to procedural, issues between the parties, and that the decisions taken at or as a result of the preparatory conferences should not prejudge those substantive issues and should be taken in a manner that fully observed the procedural rights of the parties.

117. The expression "Guide" was mentioned as a possible alternative to the expression "Guidelines" in the title. As alternatives for the term "preparatory conference" the following expressions were suggested: "planning conference", "preparatory meeting", "consultation" and "preparatory deliberations".

118. It was suggested that the usefulness of the Guidelines would possibly be enhanced by preparing an index and also that, in addition to the Guidelines, a summary check-list of agenda items without accompanying remarks covered in the Guidelines would be helpful to practitioners.

2. Draft chapter I, "General Considerations"

119. A suggestion was made to indicate in paragraph 2 that, in addition to provisions of rules agreed to by the parties, specific agreements by the parties might constitute a further limitation to the discretion of the arbitral tribunal. It was suggested that appropriate drafting changes be made throughout the Guidelines to reflect that.

120. As to paragraph 3, it was proposed to delete the reference to the preferred procedural style since such preferences might not be shared by all the parties in the arbitration and since a shared preference was not necessary for a decision by the arbitral tribunal to use a particular manner of proceeding.

121. A proposal was made that it would be useful to mention in paragraph 6 the reasons that might prompt the arbitrators to hold a preparatory conference. Furthermore, it was noted that not all matters considered at a preparatory conference could be regarded as details of procedure.

122. As to paragraph 15, it was suggested that the Guidelines should express that established practice at the place of arbitration was another factor to be borne in mind in carrying out preparatory conferences. In opposition, it was said that arbitration practice, to the extent that it was not incorporated into the agreed arbitration rules, was difficult to ascertain and not binding, and that therefore it was inappropriate to refer to an obligation to observe such practice.

123. One view supported deletion of paragraph 17 and of those parts of paragraph 16 that referred to modifications of the arbitration rules agreed upon by the parties. It was said that the arbitration rules became applicable as a result of agreement of the parties and that, while it was implicit that the parties could decide to modify their agreement, it was inappropriate for the

arbitral tribunal to raise at the preparatory conference the question of any such modification. Another view was that the text under discussion was useful to the extent that it contained a warning about possible difficulties resulting from modifications of arbitration rules.

3. Draft chapter II, "Convening and conducting preparatory conference"

124. The concern was expressed that the last sentence of paragraph 19 might be understood as implying that there was always an inherent risk that the preparatory conferences might add to the costs or complicate the administration of the proceedings. In order to alleviate that concern, it was suggested to refer in positive terms to the advantages of preparatory conferences in lowering costs by establishing efficient arrangements for the arbitral proceedings.

125. The suggestion was made that the last sentence of paragraph 21 should be deleted since the fact that one of the parties might object to the holding of a preparatory conference did not necessarily mean that the conference would not meet its objectives. It was pointed out that planning efficient proceedings should not be barred by objections of one of the parties. Nevertheless, the opinion was expressed that it might indeed not be appropriate for the arbitral tribunal to hold a preparatory conference if one of the parties objected and failed to participate in it, as described in paragraph 22. In case such a preparatory conference was held anyway in the absence of a party, it was considered necessary to emphasize that the tribunal in taking decisions had to observe the principles of due process of law.

126. With regard to paragraph 23, one view was that it should be retained with some amendments. In support of that view, it was stated that it was useful to clarify who the participants of a preparatory conference might be. It was suggested that paragraph 23 should state first what was usual, namely that, when the parties were represented by legal counsel or other agents, typically the representatives of the parties would attend the preparatory conference, and then explain the reasons that might make it necessary or useful for the parties themselves to be present. Another suggestion was to mention that the invitation to the preparatory conference should indicate also the issues to be addressed at the conference. Another view was that paragraph 23 should be deleted since it was inappropriate for the arbitral tribunal to make suggestions to the parties as to who should participate in the preparatory conference on their behalf.

127. With regard to paragraph 24, the view was expressed that the decision to confer by telecommunications (e.g., by telefax or multilateral telephone conversation) depended on a number of factors and not only on the number of procedural issues to be resolved.

128. The suggestion was made that it might be useful to consider in the context of paragraph 25 the possibility of planning the proceedings on the basis of a questionnaire that the tribunal might address to the parties or on the basis of written submissions of the parties.

129. As to paragraph 31 it was suggested that holding more than one preparatory conference need not be limited to exceptional cases and that time and cost were not the only factors to be considered in determining whether to hold more than one conference, but rather that a relevant factor to be considered was the extent to which a conference could lead to more efficient arbitral proceedings.

130. Differing views were expressed with regard to paragraph 33. One view was that it should be deleted since it was not necessary for the Guidelines to enter into the difficult question of categorization of decisions taken at a preparatory conference. Another view was that the paragraph should be retained but amended without distinguishing between issues of substance and issues of procedure, because it might be difficult to make that distinction. One suggested amendment was to delete the reference to the substance of the dispute since preparatory conferences were intended to settle procedural and not substantive matters. Another suggestion was that examples of issues to be resolved at a preparatory conference should be given without categorizing the issues. It was observed that, while the purpose of the preparatory conference was not for the arbitral tribunal to take decisions on the substance of the dispute, the parties should be able at the conference to define or narrow by agreement the scope of issues to be decided by the arbitral tribunal (as discussed in particular in chapter III, items D and E).

131. A suggestion was made to mention in paragraph 33, or elsewhere, that the preparatory conference presented an opportunity to the parties to enter into agreements that could exclude or reduce the possibility of bringing a recourse action against an award or of raising objections against recognition and enforcement of the award. The suggestion was opposed on the ground that in many legal systems the question of recourse to courts was governed by provisions that could not be derogated from; furthermore, it was inappropriate for the arbitral tribunal to suggest to the parties to renounce any rights of recourse against the award that they might have.

132. It was observed that the two approaches referred to in paragraph 34 with regard to the way in which decisions were arrived at and recorded were not mutually exclusive. It was noted that certain agreements of the parties should be in writing (e.g., art. 1 (1) of the UNCITRAL Arbitration Rules envisaged modifications of the Rules to be in writing), and the suggestion was to draw attention to such cases in the Guidelines.

133. The concern was expressed that the first sentence of paragraph 35 might create an undesirable impression that it was beneficial for the arbitrators to limit their discussions with the parties concerning decisions to be taken.

134. With respect to paragraph 36, it was suggested that the level of detail of the decisions taken at a preparatory conference should depend largely on whether the information available to the arbitrators at the time enabled them to formulate specific decisions.

4. Draft chapter III, "Annotated check-list of possible topics for preparatory conference"

135. It was considered that it should be made clear in draft chapter III that some of the topics mentioned in the check-list were suitable for being addressed at an early stage of the proceedings, when all the points at issue might not yet have been presented to the arbitral tribunal, whereas some other topics in the check-list could properly be taken up at a later stage, after the parties had stated their claims and defences. Examples of topics in the first category were, for example, rules governing the arbitral procedure (item A), language of proceedings (item M) or place of arbitration (item P); examples of topics in the second category were the definition of issues and the order of deciding them (item D), stipulations that certain facts or issues were undisputed (item E) and matters relating to the taking of evidence (items F to J).

136. While one suggestion was to leave to the arbitral tribunal a degree of discretion as to the manner of preparing the agenda of the preparatory conference, another suggestion was to recommend in the introductory part of chapter III that the agenda should be prepared in consultation with the parties.

137. It was observed that according to paragraph 38, as a matter of general rule qualified by the discretion of the arbitral tribunal, topics that had not been announced in the agenda should not be raised at the preparatory conference. The view was expressed that the paragraph should indicate a somewhat broader scope for a party to be able to raise a topic outside the agenda.

(a) Topic A, "Rules governing arbitral procedure"

138. Some support was expressed for the view that item A should be deleted from the check-list. It was pointed out that, in view of the great number of sets of rules available to be agreed upon, the discussions concerning the choice might be difficult and inordinately lengthy, thus delaying the case or providing an opportunity for dilatory tactics, and therefore might add another contentious issue to the existing ones. Moreover, it would be necessary to modify the rules chosen at that stage of the proceedings to delete provisions that were no longer applicable, such as those governing initial pleading and formation of the arbitral tribunal, and that such modifications might be a complex task because rules often included intertwined provisions. In addition, if the rules chosen were ones prepared for arbitrations administered by an institution, adjustments to the rules might affect the functions of the institution necessary to the operation of their rules, which would complicate the discussions or introduce an element of uncertainty into the procedure.

139. However, there was support for the view that the item should be retained since it might be useful to remind the parties, at an early stage of the proceedings, that they might wish to consider agreeing on a set of arbitration rules if they had not done so. It was pointed out that considerations to agree on a set of rules would not delay the proceedings since, if it appeared that agreement could not be reached promptly by the parties, the tribunal could seek to discontinue the discussion.

(b) Topic B, "Jurisdiction and composition of arbitral tribunal"

140. Differing views were expressed as to whether item B should be retained in the Guidelines. One view was that it should be retained, since an early clarification as to whether the parties agreed that the arbitral tribunal had been properly constituted and as to whether the tribunal had jurisdiction over the dispute would be useful so as to avoid the possibility of later objections raised merely to delay the proceedings or enforcement of the award.

141. Another view, which received considerable support, was to delete item B. Attention was drawn to provisions in laws and rules on arbitral procedure (such as art. 16 (2) of the UNCITRAL Model Law on International Commercial Arbitration and art. 21 of the UNCITRAL Arbitration Rules), according to which objections concerning jurisdiction had to be raised not later than the submission of the statement of defence or as soon as the matter alleged to be beyond the authority of the tribunal was raised during the arbitral proceedings. With reference to those laws it was said that, if the preparatory conference was held before the submission of the statement of defence, it was inappropriate to call upon the party to express its position on jurisdiction before it had fully considered and submitted its defence; on the other hand, if the preparatory conference was held

after the submission of the statement of defence, it would ordinarily be too late for objections concerning jurisdictions.

142. Furthermore, it was stressed that any objection as to jurisdiction or composition of the arbitral tribunal should be left entirely to the parties, and that it was inappropriate for the arbitral tribunal at a preparatory conference to request the parties to pronounce themselves on the issue. To the extent the term "composition of the arbitral tribunal" could be understood as covering also any intention to challenge an arbitrator because of circumstances giving rise to doubts as to its impartiality or independence, it was also considered that that question was only for the parties to raise and that arbitration laws and rules usually contained a strict system for challenges (such as art. 13 of the UNCITRAL Model Law on International Commercial Arbitration and art. 11 of the UNCITRAL Arbitration Rules).

(c) Topic C, "Possibility of settlement"

143. The views differed as to whether it was appropriate for the arbitral tribunal on its own initiative to raise the question of a possible settlement and as to the manner in which the arbitral tribunal might be involved in any settlement negotiations. It was stated that in some legal systems it was considered incompatible with the function of the arbitrator to inquire about settlement; moreover, it was said that such an inquiry might worsen the procedural atmosphere, might put a party in an uncomfortable situation of having to refuse to settle, might raise doubts about the impartiality of the arbitrators and, in case of unsuccessful conciliation, increase the likelihood of objections against the award.

144. Statements were made about legal systems where an inquiry about possible settlement was provided for by the law governing court proceedings and where such an inquiry was sometimes also considered acceptable and desirable in arbitral proceedings, provided that it was done in a way that did not compromise the impartiality of the tribunal.

145. As to the case where the parties on their initiative requested the arbitral tribunal to assist them in reaching a settlement, one view was that the roles of an arbitrator and a conciliator were difficult to reconcile and that it was therefore appropriate for the arbitrators to refuse to act as conciliators or to be reserved in responding to such an initiative. Another view was that, while the arbitral tribunal should always be careful to maintain its impartiality, the benefits of a settlement justified the arbitral tribunal in being forthcoming in responding to such requests of the parties.

146. One suggestion based on those discussions was that the Guidelines, with appropriate warnings, should mention the divergent views and practices and that it should be left to the practitioners to decide, in line with the applicable laws and practices, on the most appropriate manner of proceeding. The opposite suggestion was to delete remarks 1 and 2 and to retain only remark 3 so as to make it clear that any settlement negotiations should concern the arbitral tribunal only as a factor affecting scheduling of the proceedings. It was said that a description of differing views and practices along the lines of remarks 1 and 2 would not provide a sufficiently clear guidance to practitioners as to how they should act.

147. It was observed that, while there was a direct connection between the agenda item and remark 3, no such direct connection existed with remarks 1 and 2.

(d) Topic D, "Defining issues and order of deciding them"

Item (i)

148. It was suggested to delete in the last sentence of remark 1 the reference to the request that the proceedings be conducted on the basis of documents only. It was said that in any circumstances it was inappropriate for the arbitral tribunal to take an initiative for dispensing with oral hearings, since one or more parties might regard oral arguments on issues of law as being just as important as oral arguments on issues of fact.

149. On the other hand, some merit was found in the sentence in that it gave an example of how costs of arbitration could be limited after the points at issue had been defined. A suggestion was made to clarify in the example that instead of dispensing with oral hearings their scope might be reduced. It was said that, if the example were to be retained, it should make clear that the parties had an unqualified right to oral hearings irrespective of the nature of the issue to be decided, subject only to any contrary provision in applicable rules or in an agreement of the parties. It was also proposed that the example should not encourage the arbitral tribunal to take the initiative concerning dispensing with, or limiting, oral hearings, and leave any such initiative to the parties.

150. There was a suggestion that it depended on the applicable law which facts had to be proved for a party to establish its case, and that, therefore, points at issue could be fully defined only if it was clear which law applied to the substance to the dispute. Thus, topics D and E should not be placed on the agenda if at the time of holding the preparatory conference it was not settled which law governed the substance of the dispute.

Item (ii)

151. It was considered that remarks 6 and 7 should be deleted since they commented on the substance of the dispute and since they might lead to doubts and uncertainties.

Item (iii)

152. As to remark 9, it was suggested that, in determining the order of deciding issues, the arbitral tribunal should be careful not to appear to be prejudging, or expressing an opinion on, the substance of an issue.

153. It was observed that sometimes a determination of the order in which issues were to be decided might subsequently need to be changed and that the Guidelines might refer to such a possibility.

154. With respect to the last sentence of remark 9, it was suggested that the criterion for the order of deciding the issues should be whether one issue was preliminary with respect to other issues. Reservations were expressed about using other criteria for determining that order, as mentioned in the last sentence of remark 9, in so far as the use of those other criteria might constitute an unwarranted and premature indication about the likelihood of success of a claim or might interfere with the manner in which a party wished to argue its case.

155. One view was that remarks 10 and 11 relating to partial, interim and interlocutory awards were useful as they further elaborated points made in remark 9. The opposite view was that the remarks should be deleted since they

went beyond the scope of the discussion of the agenda item, because there did not exist a generally accepted definition of partial, interim and interlocutory awards, and because it was not possible to give a proper explanation of that complex subject-matter in the limited space that could be devoted to it.

(e) Topic E, "Undisputed facts or issues"

156. It was considered that remark 3 should be deleted. It was said that the Guidelines should not suggest that the arbitral tribunal should make an announcement concerning costs of arbitration as envisaged in remark 3, since such an announcement might be perceived as coercion and since remark 3 gave undue prominence to only one of the factors to be taken into account in apportioning costs.

(f) Topic F, "Arrangements concerning documentary evidence"

Item (ii)

157. It was suggested that in remarks 4 and 5 the term "presumption" should be replaced by another term.

Item (v)

158. With respect to requests for production of documents, a suggestion was made that the remarks should clarify the need for respecting the confidentiality of the produced documents. A special reason for such a need was that privileged documents (e.g., communications between a client and its legal counsel) might lose their privileged status if their confidentiality was not respected. Article 20 of the UNCITRAL Conciliation Rules was mentioned as a possible model for devising an approach to the issue of confidentiality.

159. A view was expressed that the sentence of remark 11 that dealt with requests for "internal" documents should be deleted since it might unduly restrict requests for certain types of internal documents (e.g., minutes of shareholders' meetings or memoranda sent within a company) even if the arbitral tribunal would consider a request for their production reasonable. It was noted, however, that in a number of legal systems the conditions for requests for the production of documents and in particular of internal documents were rather restricted and that, for that reason, it was necessary to find a solution that was generally acceptable.

160. With respect to the reference to the right to refuse to take a self-incriminating action (remark 13), it was suggested that such a right was relevant in a criminal court but not in an arbitration.

(g) Topic G, "Arrangements concerning physical evidence"

161. It was proposed that the last sentence of remark 3 should be reviewed so as to avoid the impression that the Guidelines suggested that employees of a party might be heard as witnesses during an on-site inspection of property or goods.

(h) Topic H, "Arrangements concerning evidence of witnesses"

Item (i)

162. The view was expressed that the last sentence of remark 3 should be deleted since the sentence indicated a bias against oral, as opposed to written,

testimony. It was said that the sentence unduly impinged upon the principle that any decision to forgo oral testimony should be left entirely to the parties.

163. It was observed that under some legal traditions the oath was regarded as an important, and in certain situations a necessary, element of a witness's testimony. Thus it was said that, in order to replace a traditional oath by a signed declaration, as referred to in remark 6, the consent of both parties was necessary.

164. It was indicated that differing methods were used for protocolarizing signatures on statements of witnesses, and that those methods were in some cases governed by international treaties. It was stated that, in view of those differences, the Guidelines should not attempt to discuss, or provide advice on, the various methods used for preparing written statements by witnesses; rather, the Guidelines should be limited to a reminder that, before the parties were called upon to produce written statements of witnesses, there should be a common understanding as to how those statements were to be prepared.

Item (ii)

165. It was suggested that remarks 8 to 12 should be deleted. In support of the suggestion it was said that the limited scope of the Guidelines did not permit an appropriate description of the different methods of hearing witnesses. Moreover, such a description was not necessary since the purpose of the Guidelines was to indicate the matters on which early procedural decisions were necessary, but not to attempt to give advice as to the possible content of those decisions. It was observed that some legal systems contained mandatory provisions concerning the formalities to be observed with respect to oaths.

166. Another suggestion was to delete only remarks 8 and 9. The other remarks under item (ii) were said to serve a useful purpose as they drew attention to matters that gave rise to problems in practice.

Item (iii)

167. It was stated that, as regards procedures for taking evidence of witnesses, in many legal systems persons affiliated with a party were not treated differently from other persons, and that therefore remark 15, and in particular its first sentence, should be reviewed.

(i) Topic I, "Arrangements concerning evidence of experts"

168. No comments were made concerning topic I.

(j) Topic J, "Arrangements concerning written submissions"

169. It was suggested that remark 2 was too detailed. It was said that, instead of describing various kinds of documents that might be presented, the remark should only remind the arbitral tribunal to inquire what kind of documents the parties intended to present.

170. It was stated that the advantages and disadvantages of consecutive and simultaneous submissions depended on a number of considerations, some of which were not mentioned in remark 5 (e.g., speed of proceedings), that the evaluation of those considerations was within the discretion of the arbitral tribunal and

that the Guidelines should not attempt to guide the arbitrators as to how they should exercise the discretion.

(k) Topic K, "Practical details concerning exhibits and writings"

171. It was noted that the agenda under topic K was more detailed than some other agenda items, and that the remark to topic K was short compared to other remarks. In discussing what was the desirable level of detail of agenda items and remarks, it was said that the answer depended partly on the form and content of a summary check-list of issues covered in the Guidelines, which was suggested to be prepared (see para. 118 above). For example, if such a summary were to be prepared as a check-list of agenda items to be published separately from the Guidelines, the agenda items should be sufficiently detailed to be useful standing alone.

(l) Topic L, "Hearings"

Introductory remarks and item (i)

172. The view was expressed that it might be useful to address at a preparatory conference the question of the confidentiality of hearings.

173. It was pointed out that decisions concerning hearings could properly be taken only after the parties had stated their claims and defences and the arbitral tribunal could anticipate the extent of evidence to be taken. It was suggested that the Guidelines should reflect that factor (see also para. 135 above).

174. An observation was made that topic L, and the draft Guidelines in general, were too detailed and placed undue emphasis on formalities that approximated arbitral procedures to judicial procedures, which was not in accordance with the principle of flexibility of arbitration.

175. It was suggested that the wording of the chapeau of the agenda did not adequately express that holding hearings was a usual manner of proceeding and that documents-only proceedings were an exception.

176. As to remark 2, second sentence, it was stated that the arbitral tribunal, by revealing to the parties its interim views on the merits of the case, would compromise its impartiality. It was therefore suggested to delete the sentence. Another statement was that the sentence was too simplistic in that, if the arbitral tribunal decided to reveal its interim views on the merits of the case, that should be done with utmost caution and, for example, only when all the arbitrators agreed that a party was wasting money and time by unnecessarily pursuing a certain line of argument or evidence. A similar criticism was expressed regarding the last sentence of remark 5.

177. Also in connection with the discussion of the second sentence of remark 2, it was suggested that the entire remark 2 as well as remark 5 should be deleted because the Guidelines should not venture into explaining the advantages and disadvantages of oral hearings and how those hearings were to be carried out. Such explanations were beyond the proper scope of the Guidelines, which should only discuss the types of decisions to be taken and not deal with the substance of those decisions.

178. It was said that remark 7 might be understood as advice against fixing definitive dates for hearings; such advice should not be made since in many cases fixing definitive dates was desirable.

Item (iii)

179. While it was approvingly recognized that remark 13 pointed out that the procedural patterns referred to in remarks 11 and 12 were examples to be adapted to the circumstances of the case, it was argued that remarks 11 and 12 should be deleted since it was not possible in such a brief fashion to explain all aspects to be taken into account in deciding the order of presentations at hearings, and since the Guidelines should not attempt to guide arbitrators as to how they should exercise their discretion. In addition, some apprehension was expressed that the remarks might be misunderstood as being a qualification by UNCITRAL of the principle that each party had to be given a full opportunity of presenting its case; such a misunderstanding might result in the remarks being relied upon in court proceedings in which a party was opposing recognition and enforcement of the award.

Item (iv)

180. According to one view, the discussion in remarks 14 and 15 was useful. Another view was that the Guidelines should mention only the need to clarify whether any notes of oral arguments were intended to be handed over, and should not discuss the possible solutions as to the time of handing over such notes and their scope and content. It was suggested to review the remarks bearing in mind existing rules on the closure by the arbitral tribunal of hearings (e.g., art. 29 of the UNCITRAL Arbitration Rules).

(m) Topic M, "Language of proceedings"

181. It was suggested to reconsider the order in which topic M, and possibly other topics, appeared in draft chapter III, and that some guidance concerning the order of topics could be drawn from the order of articles in the UNCITRAL Arbitration Rules and the UNCITRAL Arbitration Model Law.

182. As to the question of which documents delivered in their original language were to be accompanied by a translation into the language of the proceedings, which was dealt with in remark 2, it was suggested to review the remark in the light of article 17 of the UNCITRAL Arbitration Rules.

(n) Topic N, "Administrative support"

183. It was suggested to express in the remarks that the kinds of administrative services mentioned in the agenda were provided also by international arbitral institutions, and that some of those institutions had entered into cooperation agreements among them with a view to offering mutual assistance in providing administrative services.

(o) Topic O, "Secretary or registrar of arbitral tribunal"

184. It was observed that at some arbitration venues arbitral institutions appointed persons, referred to as "rapporteurs", whose functions included maintaining the files of the proceedings, preparing information materials and providing assistance to the arbitrators concerning aspects of the form of the award and other decisions.

(p) Topic P, "Place of arbitration"

185. It was stated that the list of the factors in remark 2 left unclear what was the relative importance of the factors; for instance, the enforcement regime of the award (factor (g)) might be misunderstood as being the least important by virtue of being at the bottom of the list. The suggestion made in connection with that statement was that remark 2 should not attempt to clarify the various factors, but that the entire remark should be deleted since the Guidelines should be limited to raising the question of the determination of the place of arbitration, without discussing the factors on the basis of which that place should be chosen.

(q) Topic Q, "Mandatory provisions governing arbitral proceedings"

Item (i)

186. It was considered that agenda item (i) and the corresponding remarks should be deleted because, inter alia, they interfered with the principle that it was typically the duty of the arbitral tribunal to obtain knowledge of and interpret the law governing arbitral procedure.

Item (ii)

187. A view was expressed that agenda item (ii) and the corresponding remarks should be deleted since compliance with requirements concerning filing or registering the award, or concerning the method of delivery of the award, was not a matter to be planned at the early stage of proceedings at which preparatory conferences were usually held. Furthermore, raising the issue in the Guidelines might create the impression that the filing or registering of the award was an obligation of the arbitral tribunal, an impression that in many cases was inaccurate.

188. Hesitation was expressed about the proposal for the deletion of agenda item (ii) since it was considered important to remind the participants in arbitration of the requirements mentioned in the agenda item and of the sometimes harsh consequences for failure to comply with those requirements.

(r) Topic R, "Multi-party arbitration"

189. It was suggested that planning multi-party arbitral proceedings touched upon several topics in the draft Guidelines (e.g., arrangements concerning evidence and hearings). A further suggestion was made that the discussion on multi-party arbitration, instead of being presented as an agenda item, should be incorporated into a separate section of the Guidelines.

190. As to remark 4, it was suggested to delete the text after the first sentence, since the purpose of the Guidelines was not to provide advice on matters which arbitration rules and laws typically left to the discretion of the arbitral tribunal.

191. With respect to remark 6, it was stated that the Guidelines should avoid creating an impression that it was not entirely up to each party to decide at which hearings it wished to participate. In connection with that statement it was suggested that remark 6 should be deleted.

(s) Topics S, "Deposits for costs"; and T, "Any other procedural matter"

192. No comments were made on topics S and T. (In relation to topic T, see para. 137 above.)

5. Possible further issues to be covered in the Guidelines

193. Suggestions were made to consider addressing in the Guidelines the following matters:

(a) Designation of an appointing authority if such an authority had not been designated (e.g., for the purpose of being able to refer to it any challenge or replacement of an arbitrator, or to obtain from it assistance concerning fixing the amount of fees of the arbitral tribunal or fixing the amount of deposits);

(b) Confidentiality of information disclosed during the arbitral proceedings (see also paras. 158 and 172 above);

(c) The use of electronic data interchange (EDI) in the conduct of arbitral proceedings (e.g., for the purposes of transmitting evidence, arguments or information), the manner of presenting EDI records and messages as evidence, and their evidential value;

(d) Establishing ground rules for communications between the parties and the arbitral tribunal (e.g., concerning limitations on ex parte communications, the number of copies to be transmitted; routing of written communications; and the use of telefax, telephone and conference telephone calls).

C. Conclusion

194. The Commission requested the Secretariat to revise the draft Guidelines in the light of the discussions at the current session and to submit a revised draft to the Commission at its twenty-eighth session in 1995 with a view to the finalization of the text at that session.

195. The Commission noted with satisfaction that the XIIth International Arbitration Congress, to be held by the International Council for Commercial Arbitration (ICCA) at Vienna from 3 to 6 November 1994, would provide a welcome opportunity for practitioners from different parts of the world to comment on the draft Guidelines.

IV. GUARANTEES AND STAND-BY LETTERS OF CREDIT

196. The Commission, at its twenty-second session, in 1989, decided that work on a uniform law on guarantees and stand-by letters of credit should be undertaken and entrusted that task to the Working Group on International Contract Practices. 7/ At its current session, the Commission had before it the reports of the twentieth and twenty-first sessions of the Working Group (A/CN.9/388 and A/CN.9/391), at which the latter had continued the preparation of a draft convention on independent guarantees and stand-by letters of credit. Previously, the Working Group had devoted its thirteenth to nineteenth sessions to that task. The reports of those sessions were contained in documents A/CN.9/330, A/CN.9/342, A/CN.9/345, A/CN.9/358, A/CN.9/361, A/CN.9/372 and A/CN.9/374. The Commission noted that the Working Group had modified the title of the draft convention to refer to "independent guarantees and stand-by letters of credit", rather than using the term "guaranty letters".

197. The Commission expressed its appreciation for the work accomplished so far by the Working Group and requested the Working Group to proceed with its work expeditiously so as to present the draft convention to the Commission at the twenty-eighth session in 1995.

V. LEGAL ISSUES IN ELECTRONIC DATA INTERCHANGE

198. At its twenty-fifth session, in 1992, the Commission entrusted the preparation of legal rules on electronic data interchange (EDI) to the Working Group on International Payments, which it renamed the Working Group on Electronic Data Interchange. 8/ At its twenty-sixth session, in 1993, the Commission had before it the report of the Working Group on the work of its twenty-fifth session (A/CN.9/373). The Commission noted that the Working Group had started discussing the content of a uniform law on EDI and expressed the hope that the Working Group would proceed expeditiously with the preparation of that text. 9/

199. At its current session, the Commission had before it the reports of the Working Group on the work of its twenty-sixth and twenty-seventh sessions (A/CN.9/387 and A/CN.9/390). The Commission expressed its appreciation for the work accomplished by the Working Group and noted that the Working Group had decided to use the term "model statutory provisions" in order to reflect the special nature of the text as a variety of statutory rules that an enacting State would not necessarily incorporate as a whole or together in any one particular place in its statutes (A/CN.9/390, paras. 16-17).

200. As to the time schedule for completion of the current work of the Working Group, the view was expressed that it might be difficult to complete the current work within one year and submit the model statutory provisions to the Commission at its next session since a number of issues, such as scope of application and party autonomy, still remained to be resolved, and that, at any rate, the Commission might not have sufficient time available on the agenda of its next session to consider the rules. The prevailing view, however, was that a draft set of basic, "core" provisions could be completed by the Working Group at its twenty-eighth or twenty-ninth session, in particular since it had been decided that the relationships between EDI users and public authorities, as well as consumer transactions, should not be the focus of the model statutory provisions (ibid., para. 21). It was pointed out that further provisions could be added at a later stage, in particular since that was an area of rapid technological development.

201. As to possible future topics, the Commission noted that, at its twenty-seventh session, the Working Group had adopted a recommendation to the Commission that preliminary work should be undertaken on the issue of negotiability and transferability of rights in goods in a computer-based environment as soon as it had completed the preparation of the model statutory provisions (ibid., para. 155). That recommendation received general support. Another suggestion was that a broader approach should be adopted so as to include in any future work the negotiability of rights in securities. That suggestion was objected to on the ground that it might be particularly difficult to achieve uniformity on that concept in view of the high degree of regulation at the national level. Yet another suggestion, which received some support, was that the Commission should consider the legal issues arising in the context of the relationships between EDI users and service providers, such as electronic communications networks. However, recalling the discussion of that suggestion at the twenty-seventh session of the Working Group (ibid., para. 159), the Commission was of the view that, at least at the current stage, the liability of service providers was better dealt with in communications agreements and that, at any rate, it would be very difficult to devise rules that would apply to all types of electronic communications services. Yet another suggestion was to prepare a study on legal issues of encryption. With regard to that suggestion,

the view was expressed that the matter fell more appropriately within the mandate of specialized national or international bodies.

VI. CASE-LAW ON UNCITRAL TEXTS (CLOUT)

A. Introduction

202. Pursuant to a decision taken by the Commission at its twenty-first session, the Secretariat established CLOUT ("Case-Law on UNCITRAL Texts"). 10/ The mechanism for the operation of CLOUT was set forth in document A/CN.9/SER.C/GUIDE/1.

B. Considerations by the Commission

203. At its current session, the Commission noted with appreciation the existence of three editions of the CLOUT abstracts series containing abstracts on 52 court decisions and arbitral awards relating to the United Nations Convention on Contracts for the International Sale of Goods and the UNCITRAL Model Law on International Commercial Arbitration (A/CN.9/SER.C/ABSTRACTS/1, 2 and 3). The conviction was widely expressed that CLOUT would be beneficial, in particular in promoting the uniform interpretation and application of the statutory texts of UNCITRAL.

204. The Commission noted that National Correspondents had to collect decisions and arbitral awards, prepare abstracts and forward the abstracts along with the full texts of decisions and awards to the Secretariat, and emphasized that for CLOUT to reach its full capacity the network of National Correspondents had to be complete and that they needed to perform their tasks promptly. The Commission also noted that the Secretariat's work of editing abstracts, storing decisions and awards in their original form, translating abstracts into the other five United Nations languages, publishing them in the six United Nations languages and forwarding abstracts and full texts of decisions and awards to interested parties upon request would substantially increase as the number of decisions and awards covered by CLOUT increased. The Commission therefore requested the Secretariat to ensure that adequate resources were allocated for the effective operation of CLOUT. The Commission expressed its appreciation to the National Correspondents and the Secretariat for their work and urged States to cooperate with the Secretariat in the operation of CLOUT and to facilitate the carrying out of the tasks of the National Correspondents.

205. A number of suggestions were made with a view to enhancing the utility of CLOUT. One suggestion was to prepare an index on the basis of legal issues rather than one exclusively on the basis of the texts in which the issues might be encountered. In order to promote the dissemination of CLOUT, it was suggested that CLOUT documents should be made available through electronic communications systems to users at several locations throughout the world, including academic institutions, arbitration centres and United Nations information centres.

206. The Commission noted that, based on the decision of National Correspondents taken at their fifth annual meeting (Vienna, 22 July 1993), copyright on CLOUT documents was assigned by National Correspondents to, and rested with, the United Nations. The Commission also recalled the discussion which had taken place at its twenty-first session 11/ and noted that emphasis should be placed upon the importance of the widest possible dissemination of CLOUT documents. The Commission was agreed that the primary purpose for publishing CLOUT documents under United Nations copyright was to avoid distortion of their

contents by unauthorized users and that, should copyright impede the widest possible dissemination of CLOUT, it would have to be re-evaluated.

207. Finally, the Commission agreed that, while policy matters related to CLOUT fell within its mandate, the specific details of the operation of CLOUT should be left to the discretion of the National Correspondents. In that connection the concern was expressed that, in order to enhance the importance of the meetings of National Correspondents, efforts should be made towards achieving a broader participation of National Correspondents in annual meetings and reporting to the Commission on important matters arising with regard to the operation of CLOUT.

VII. FUTURE WORK

A. Legal aspects of receivables financing

208. At its twenty-sixth session (1993), the Commission had before it a note by the Secretariat on assignment of claims and related matters (A/CN.9/378/Add.3). The note described briefly some of the legal issues in assignment of claims that gave rise to problems in international trade. On the basis of that note, the Commission requested the Secretariat to prepare a study identifying the area in which unification work might appear to be promising with a view to facilitating a decision of the Commission on the feasibility of such work. The Commission requested the Secretariat to prepare that study, in cooperation with UNIDROIT and other international organizations, in order to avoid duplication of work.

209. Pursuant to that request, the Secretariat submitted to the Commission, at its current session, a report (A/CN.9/397) discussing the possible scope of work. It suggested that work might be both desirable and feasible, in particular, if it were limited to assignment of international commercial receivables, i.e., claims for payment of sums of money that arose from international commercial transactions, including assignments by way of sale or by way of security, non-notification assignment, factoring to the extent that it was not covered in the UNIDROIT Convention on International Factoring (Ottawa, 1988), forfaiting of non-documentary receivables, securitization and project finance. The report described a number of possible topics, such as non-assignment agreements, bulk assignments, form of assignment, effects of assignment between the assignor and the assignee towards the debtor and towards third parties, as well as the related issue of priorities among claimants laying a claim on the assigned receivables. In addition, it referred to the possibility of international registration as a possible solution to the problem of priorities. It noted that the mechanism of registration raised issues that went beyond assignment of receivables and also might at some point be relevant to work in other areas such as negotiability of rights in goods, which the Working Group on Electronic Data Interchange had recommended to the Commission as a possible future topic (see A/CN.9/390, para. 157, as well as para. 201 of the present report), and the topic of securities, which had been proposed during the Congress as a possible future topic, the feasibility of which was currently being examined.

210. The Commission expressed its appreciation to the Secretariat for pursuing cooperation with UNIDROIT, which was preparing a draft convention on security interests in mobile equipment, and with the European Bank for Reconstruction and Development (EBRD), which had prepared a Model Law on Secured Transactions. Steps taken included the submission of a draft of document A/CN.9/397 to UNIDROIT and EBRD for comments and the oral presentation of its final version to the UNIDROIT Governing Council at its recent meeting (Rome, 9-14 May 1994). The Commission endorsed the conclusion (A/CN.9/397, paras. 52-56) that work in the area of receivables financing was both desirable and feasible, in view, in particular, of the fact that a basis had been laid, at the last session, for cooperation and coordination with a view to avoiding overlap and other potential difficulties. The Commission requested the Secretariat to prepare a study that would discuss in more detail the issues that had been identified, possibly accompanied by a first draft of uniform rules. Some reservations were expressed, however, as to the advisability of dealing with the legal aspects of the establishment and operation of an international register.

211. It was noted that the study would be prepared in cooperation with UNIDROIT and other interested international organizations, such as the International Bank for Reconstruction and Development and the Inter-American Development Bank, as well as national agencies involved in law reform in the area of receivables financing, as was traditionally done in UNCITRAL projects. In particular the importance of close cooperation with UNIDROIT was emphasized for a number of reasons.

212. One reason was the link between receivables financing and factoring. In that connection, it was pointed out that the work of the Commission on receivables financing would not interfere in substance with the UNIDROIT Convention on International Factoring, since the Convention covered only certain types and aspects of international factoring, and not the broad area of receivables financing or other important aspects, such as the issue of priorities between several claimants laying a claim on the assigned receivables. It was stated that the prospects for the wider possible adoption of that Convention, which as reported was being considered for adoption by a number of States, would be enhanced should the Commission prove to be able to devise a uniform rule settling the issue of priorities (ibid., paras. 36-42). In particular, in order to preclude giving rise to the possible inference that the work of the Commission in the area of receivables financing might justify delaying adoption of the Factoring Convention, or that the Convention had to be revised or updated, the Commission expressed the view that States should consider adopting the Convention.

213. Another reason was that international registration (ibid., paras. 43-51) was being envisaged in the context of UNIDROIT's work on a draft convention on security interests in mobile equipment, as a basis for the new international security interest to be established by the draft convention having effects towards third parties and for settling the issue of priorities among several adverse claimants. Yet another reason was the need to avoid duplication of efforts with the broader project envisaged by UNIDROIT with regard to security interests in general (ibid., para. 8).

214. Wide support was voiced in the Commission for the views expressed and the suggestions made in the report. However, the feasibility of encompassing securitization was questioned in view of the fact that securities markets were highly regulated at the national level. On the other hand, it was pointed out that securitization should be included in the scope of work in view of its fundamental importance for international trade, which was primarily attributable to the fact that it allowed banks to refinance their credits, thus enhancing expanded financing of trade. A recommendation was made that issues involving separate commercial circles should be considered to determine if broad rules were feasible. It was also suggested that rules should be based on commercial practice. The question was also raised as to the feasibility of devising a uniform rule dealing with the issue of the effects of assignment towards third parties in view of its complexity. The Commission did not reach a definitive decision on whether any particular issues should be dealt with in any future legal text.

B. Cross-border insolvency

215. At its twenty-sixth session (1993), the Commission, on the basis of a note by the Secretariat (A/CN.9/378/Add.4), agreed that it should consider in detail the desirability and feasibility of undertaking work in cross-border insolvency, in view of the increasing practical problems caused by disharmony among national

laws governing cross-border insolvencies. The Secretariat was requested to prepare for a future session of the Commission an in-depth study on the desirability and feasibility of harmonized rules of cross-border insolvencies. 12/

216. At the current session it was reported that, as an initial step in gathering information for the feasibility assessment requested by the Commission, the Secretariat, with the co-sponsorship and organizational assistance of INSOL International, had held a Colloquium on Cross-Border Insolvency (Vienna, 17-19 April 1994). INSOL is an international association of practitioners from the various professions that participate in cross-border insolvency cases. The Colloquium, attended by approximately 90 participants from various countries, was geared to enabling the Commission to assess from a practical standpoint the desirability and feasibility of any future work that it might consider undertaking in that area.

217. The view was widely shared at the Colloquium that there was a need to develop legal mechanisms for limiting the extent to which disparities and conflicts between national laws created unnecessary obstacles to the achievement of the basic economic and social objectives of insolvency proceedings, and thereby hampered commercial activity. It was widely reported that in the prevailing legal environment, fragmentation and compartmentalization along national lines were prevalent in the administration of cross-border insolvencies.

218. By way of conclusions, it was noted that at the Colloquium there was a high degree of receptivity to the interest expressed by the Commission in a possible project on cross-border insolvency and that the Secretariat would continue its work relating to the assessment of the feasibility of work in that area requested by the Commission, in cooperation with interested organizations.

219. The Secretariat reported that, based on a current assessment of feasibility and drawing on the discussion at the Colloquium and the consultations there with practitioners and interested organizations, it was possible at the current stage to identify a number of sub-areas of the cross-border insolvency subject in which it would appear that some work by the Commission would be not only welcome, but also feasible and useful. Moreover, it would appear possible to conduct work in those sub-areas without necessarily straying into what was generally recognized at the Colloquium as not, at least at the current stage, a feasible, or necessarily even desirable, area of work, namely, the unification of substantive insolvency law. The first sub-area concerned judicial cooperation. It was reported that INSOL International had proposed to co-sponsor with UNCITRAL and organize, in conjunction with a regional conference to be held by INSOL in Toronto in March 1995, a colloquium for judges on judicial cooperation in cross-border insolvency. The judges' colloquium would have as its aim to elicit the views of judges as to the extent to which judicial cooperation was possible under current law, for example, by application of the notion of comity; to explore limits to cooperation under current law; and to determine what rules might be necessary to enable judicial cooperation as a first step in dealing with difficulties that arose as a result of parallel proceedings and potentially conflicting legal regimes and jurisdictions.

220. A second sub-area, broadly referred to as "access and recognition", concerned the granting of access to the courts to representatives of foreign insolvency proceedings or creditors, and to giving recognition to orders issued by foreign courts administering insolvency proceedings. Preliminary work in that area could identify the advantages and disadvantages of the different

possible legislative approaches for access and recognition, taking particular account of legislative-reform efforts at the national and multilateral levels, and assess the appropriateness of formulating uniform rules on access and recognition.

221. A third possible project that might in due time be undertaken by the Commission was the formulation of a set of model legislative provisions on insolvency. While the following was not the conclusion of the Colloquium, it was observed that, without attempting a comprehensive unification of substantive law, a model insolvency code might eventually be important not only for Governments concerned with the modernization of law, but also for the commercial community and for legal practitioners. To avoid the difficulties that would be raised by attempting a global unification of the substantive law of insolvency, and to take into account the different policy options that a State would wish to consider in drafting its insolvency law, the model could present alternative provisions for implementing those various policy options. Reference was made, with a view to possible cooperation in that area with Committee J of the Section on Business Law of the International Bar Association, to the exploratory work being conducted by that body on fundamental concepts of a model insolvency code.

222. The Commission expressed its appreciation for the work that had been carried out and requested the Secretariat to proceed on the basis described above, with particular emphasis being placed at the current stage on the issues of judicial cooperation and of access and recognition.

C. Build-operate-transfer projects

223. The Commission had before it a note on possible future work in the area of build-operate-transfer (BOT) projects (A/CN.9/399). It was noted that at its twenty-sixth session, in 1993, the Commission had had before it a note on possible future work (A/CN.9/378) in which the Secretariat had informed the Commission that it was monitoring the work by the United Nations Industrial Development Organization (UNIDO) on the preparation of "Guidelines for the Development, Negotiating and Contracting of BOT Projects". At that session, the Commission had emphasized the relevance of BOT and had noted with appreciation the Secretariat's intention to submit a note to the Commission on possible future work in the area. The note under consideration was intended to apprise the Commission of the current situation in this regard.

224. The Commission noted that in its most basic form a BOT project was one in which a Government granted a concession for a period of time to a private consortium for the development of a project; the consortium then built, operated and managed the project for a number of years after its completion and recouped its construction costs and derived a profit out of the proceeds coming from the operation and commercial exploitation of the project and, at the end of the concession period, the project was transferred to the Government. The Commission also noted that the lack of expertise in putting together a BOT project, particularly within Governments, acted as a hindrance in the negotiating process.

225. It was reported that the fact that the responsibility for repayment of any loans shifted from the traditional "client" (the Government) to the private consortium implied an increased risk to the lenders. Lenders were therefore placed in a situation where they had to look for additional means of reducing their risks, including insurance. That element of non-traditional distribution

of risks between the various parties made the pre-contractual stage of a BOT project usually fairly complex.

226. It was also reported that another aspect that sometimes acted as a barrier in establishing BOT projects was the lack of legal certainty in some States regarding the realization of particular aspects of a project. In other instances, there might be lack of clarity as to the legal basis and effect of certain long-term contractual assurances that the Government would need to make to the private consortium. Enabling legislation to make the underlying legal framework attractive for BOT projects might therefore need to be enacted.

227. The Commission noted that the above-mentioned problems, among others, and the potential for the development of BOT projects, had led UNIDO to initiate the preparation of "Guidelines for the Development, Negotiation and Contracting of BOT Projects". In addition to disseminating information on BOT projects, the objective of the Guidelines was to enable States and all other interested parties to devise and formulate the appropriate approach in the promotion and development of BOT projects. It was further noted that the Secretariat had been monitoring the progress within UNIDO on the Guidelines, which were expected to be finalized in September 1994.

228. Strong support was expressed in the Commission for undertaking work in the area of BOT projects. It was observed that, although legal aspects of BOT would form part of the UNIDO Guidelines, it might not be possible to deal in that text with those aspects in a detailed manner. Particular interest was expressed in the intention of the Secretariat, once the UNIDO Guidelines had been finalized, to study the desirability and feasibility of further work by the Commission on some of the problems raised with regard to BOT projects. It was suggested that that might include, for example, the creation of an enabling legal framework for BOT projects, in particular for the concession agreement, or guidance to the parties on contracting issues, for example, by supplementing the UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works. A suggestion was also made that possible future work could be considered in the area of procurement for BOT projects.

D. Implementation of other proposals made at the UNCITRAL Congress

229. Upon completion of the discussion of the above three topics, it was brought to the attention of the Commission that, pursuant to proposals made at the UNCITRAL Congress in 1992, the first Willem C. Vis International Commercial Arbitration Moot, organized by the Institute of International Commercial Law at Pace University, New York, had been held at Vienna in March 1994. It was also reported that the Secretariat, in order to explore implementation of the proposal to establish a mechanism for monitoring implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), would hold consultations with Committee D of the International Bar Association.

VIII. ICC UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS (UCP 500)

230. The Commission had before it a note containing a request by the International Chamber of Commerce (ICC) to the Commission that it should consider recommending the use in international trade of the 1993 revision of UCP, as had been the case with earlier versions of UCP in 1962, 1974 and 1983 revisions of UCP. The Commission agreed to make such a recommendation, adopting the following resolution:

> "The United Nations Commission on International Trade Law,
>
> "Expressing its appreciation to the International Chamber of Commerce for having transmitted to it the revised text of 'Uniform Customs and Practice for Documentary Credits', which was approved by the Commission on Banking Technique and Practice of the International Chamber of Commerce and adopted by the Council of the International Chamber of Commerce on 23 April 1993, with effect from 1 January 1994,
>
> "Congratulating the International Chamber of Commerce on having made a further contribution to the facilitation of international trade by bringing up to date its rules on documentary credit practice to allow for developments in the transport industry and new technological applications, and to improve the functioning of the rules,
>
> "Noting that 'Uniform Customs and Practice for Documentary Credits' constitutes a valuable contribution to the facilitation of international trade,
>
> "Commends the use of the 1993 revision in transactions involving the establishment of a documentary credit."

231. In the discussion that preceded the adoption of the above resolution, the concern was widely expressed in the Commission that a strict application of the copyright held by ICC in UCP (or similarly for ICC's INCOTERMS or the model forms of the International Federation of Freight Forwarders Associations (FIATA)), at least as regards governmental and teaching uses of the text, was inappropriate for such a uniform legal text designed for world-wide use. It was widely felt that a restrictive approach that affected even governmental and teaching functions was detrimental to the objectives of the harmonization of law and dissemination of information and at odds with the aim of securing judicial recognition and other forms of legal support for the text. The Commission requested the Secretariat to convey the concerns that had been raised. As to the endorsement of UCP, the view was expressed that UNCITRAL should not endorse work done by non-governmental organizations without careful consideration. The Commission also expressed interest in the possibility of considering in more general terms questions raised in the discussion as to the endorsement by the Commission of legal texts formulated by other organizations, an activity within the mandate of the Commission.

IX. TRAINING AND TECHNICAL ASSISTANCE

232. The Commission had before it a note by the Secretariat (A/CN.9/400) indicating that it was continuing to conduct an active programme of training and assistance, though what was possible within limited human and financial resources met only a portion of the need and interest.

233. It was reported that, in view of the relative cost-effectiveness of national seminars compared to regional seminars, the Secretariat had continued its emphasis on the holding of national seminars. Since the previous session, national seminars had taken place in: (a) Mongolia (September 1993), in cooperation with the Government of Mongolia, and attended by approximately 30 participants; (b) Karachi, Pakistan (29 and 30 September 1993), in cooperation with the Training Institute of the Customs Authority and the Research Society for International Law, and attended by approximately 35 participants; (c) Bishkek, Kyrgyzstan (5-7 October 1993), in cooperation with the Government of Kyrgyzstan, and attended by approximately 15 participants; (d) Buenos Aires, Argentina (20 and 21 October 1993), in cooperation with the Government of Argentina, and attended by approximately 130 participants; (e) Rio de Janeiro, Brazil (25 and 26 October 1993), lectures on UNCITRAL texts held in cooperation with Candido Mendes University and PETROBRAS, and attended by approximately 65 participants; (f) Istanbul, Turkey (25-27 April 1994), in cooperation with Marmara University and the Union of Turkish Chambers of Commerce, and attended by approximately 50 participants.

234. At the regional level, a four-day UNCITRAL seminar was held within the framework of the biennial conference of the Law Association for Asia and the Pacific (LAWASIA), LAWASIA'93, at Colombo, from 13 to 16 September 1993. It was noted that Secretariat members had participated in and contributed to conferences, seminars and courses related to international trade law organized by other organizations. Furthermore, the Secretariat had agreed to co-sponsor the three-month International Trade Law Postgraduate Course to be organized in 1994 by the University Institute of European Studies and the International Training Centre of the International Labour Organization in Turin, Italy. Issues of harmonization of international trade law and various items on the Commission's work programme would be covered in the course.

235. It was reported that a two-day programme focusing on legal texts of the Commission had taken place in New York, on 25 and 26 May 1994, organized by the Union Internationale des Avocats, sponsored by the American Bar Association, the Association of the Bar of the City of New York and the New York County Lawyers Association and hosted by the School of Law of Fordham University.

236. The Secretariat reported that growing awareness of the UNCITRAL legal texts in many countries, in particular developing and newly independent States, was resulting in increased requests from countries considering adoption of legislation based on UNCITRAL texts. This frequently involved the review of draft legislation relating to UNCITRAL texts. It was reported that the Secretariat expected to intensify even further its efforts to organize or co-sponsor seminars and symposia on international trade law. For the remainder of 1994, additional seminars were being planned for Botswana, Kenya, Namibia, Uganda, the United Republic of Tanzania and Zimbabwe. It was planned that additional requests for seminars and briefing missions on UNCITRAL texts that had been received from various African, Latin American and Caribbean countries and also from countries in Eastern Europe and Central Asia would be met in 1994 to the extent possible under existing material constraints.

237. It was emphasized by the Secretariat that its ability to implement these plans was contingent upon the receipt of sufficient funds in the form of contributions to the Trust Fund for Symposia. It was also noted that no funds for the travel of participants and lecturers had been provided for in the regular budget. As a result, expenses had to be met by voluntary contributions to the UNCITRAL Trust Fund for Symposia, which remained at an insufficiently low level and was in fact declining despite the increasing demand for training and technical assistance.

238. With regard to contributions made to the UNCITRAL Trust Fund for Symposia, the Commission noted that a contribution on a multi-year basis had been made by Canada. Those kinds of contribution were of particular value because they permitted the Secretariat to plan and finance the programme without the need to solicit funds from potential donors for each individual activity. In addition, contributions from France and Switzerland had been used for the seminar programme.

239. The Commission expressed its appreciation to all those who had given financial assistance to the programme of seminars and the UNCITRAL Trust Fund for Symposia. Recognizing the crucial importance of training and technical assistance in the dissemination of information on UNCITRAL texts, the Commission noted the need for States to consider making contributions to the UNCITRAL Trust Fund for Symposia so as to enable the Secretariat to meet the increasing demands for training and technical assistance, especially in developing countries and newly independent States. The Commission also noted the need for the Secretariat to ensure that sufficient human resources would be available for meeting the increasing demands for seminars and technical assistance. Particular note was made of the value that an adequate expenditure on training and technical assistance would add to the much more substantial expenditures by the Organization and Member States in the formulation of the texts. In addition, the Commission noted the intention of the Secretariat to establish cooperation and coordination with the United Nations Development Programme and other development assistance agencies.

X. STATUS AND PROMOTION OF UNCITRAL LEGAL TEXTS

240. The Commission considered the status of signatures, ratifications, accessions and approvals of conventions that were the outcome of its work, that is, the Convention on the Limitation Period in the International Sale of Goods (New York, 1974) ("the Limitation Convention"), the Protocol amending the Limitation Convention (Vienna, 1980), the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg) ("the Hamburg Rules"), the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) ("the United Nations Sales Convention"), the United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 1988) ("the UNCITRAL Bills and Notes Convention") and the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 1991) ("the United Nations Terminal Operators Convention"). The Commission also considered the status of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). In addition, the Commission took note of the jurisdictions that had enacted legislation based on the UNCITRAL Model Law on International Commercial Arbitration ("the UNCITRAL Arbitration Model Law").

241. The Commission was pleased to note that, since the report submitted to the Commission at its twenty-sixth session (1993), the Czech Republic had deposited an instrument of succession to the ratification by the former Czechoslovakia of the Limitation Convention. It similarly noted the succession by Bosnia and Herzegovina to the accession to that Convention by Yugoslavia, as well as the ratification by Ukraine and the accession by the United States of America. The Commission noted with pleasure that the Czech Republic had also deposited an instrument of succession with regard to the Protocol amending the Limitation Convention, and that the United States of America had acceded to the Protocol.

242. The Commission was pleased to note that Austria had deposited an instrument of ratification and that Cameroon had deposited an instrument of accession with regard to the Hamburg Rules.

243. The Commission noted with pleasure that Bosnia and Herzegovina and Slovenia had deposited instruments of succession to the ratification by Yugoslavia of the United Nations Sales Convention, that the Czech Republic had deposited an instrument of succession to the ratification of the Convention by the former Czechoslovakia and that Estonia had deposited an instrument of accession to the Convention.

244. The Commission was pleased to note that since the last session Croatia and the former Yugoslav Republic of Macedonia had deposited instruments of succession to the accession by Yugoslavia to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, that the Czech Republic had deposited an instrument of succession to the ratification of the Convention by the former Czechoslovakia and that Estonia, Georgia and Saudi Arabia had deposited instruments of accession to the Convention.

245. The Commission noted with pleasure that legislation based on the UNCITRAL Arbitration Model Law had been enacted in Bermuda, Egypt, Finland, Mexico and the Russian Federation. In this connection, it was reported that the basic principles underlying the Model Law had been incorporated in the new Italian law on international commercial arbitration.

246. The Commission noted that there was some uncertainty as to whether newly formed States considered themselves bound by the Conventions to which their predecessor States had been parties. It therefore called upon those newly formed States to clarify their position and to notify the Secretary-General accordingly.

Hamburg Rules

247. The Commission, on the basis of a note by the Secretariat entitled "Status of the Hamburg Rules" (A/CN.9/401/Add.1), discussed the status of the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg) ("the Hamburg Rules"), which entered into force on 1 November 1992 and currently had 22 States parties. The note pointed out that the Hamburg Rules had been prepared with a view to replacing the "Hague" liability regime; the Hague regime had been based on the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading of 25 August 1924 ("the Hague Rules"), which some States had adopted with the amendments contained in the Protocol of 23 February 1968 ("the Hague-Visby Rules") or with further amendments contained in the Protocol of 21 December 1979. The note referred to some major differences between the Hamburg Rules and the Hague regime and described problems caused by the disparateness of the regimes.

248. It was regretted that the process of adoption by States of the Hamburg Rules was slow and that the disparity of national laws was indeed increasing in that some States had adopted, or were considering adopting, laws that combined solutions from the Hamburg Rules, the Hague regime and non-unified solutions.

249. Serious concern was expressed about the problems that arose as a result of the coexistence of different liability regimes. As a salient example of the problems, it was pointed out that goods carried in a single vessel were subject to different liability regimes, depending on the States where the particular parts of the cargo were loaded or unloaded, or where the transport contract documents for the parts of the cargo were issued. Such mixing of legal regimes increased legal costs, made it difficult for the carrier to assess its liability exposure, complicated settlement negotiations, hindered the use of uniform transport documentation, distorted competition among carriers and resulted in an unequal treatment of the carrier's customers.

250. It was noted that some persons had suggested that, in view of the fact that carriers in some countries opposed adherence to the Hamburg Rules, an attempt should be made to revise the Hamburg Rules with a view to elaborating a regime that would be more widely acceptable. The Commission was of the view that such a course of action was undesirable. It was considered that it was unlikely that the disparity of law would be overcome in that way, in particular since there was no convergence of opinion as to the provisions of the Hamburg Rules that might be modified or as to the thrust of any modification. A further reason against revision was that throughout the preparatory work towards the Hamburg Rules all interest groups had participated in the negotiations and the adopted solutions reflected the well-considered mutual concessions between the groups. The text adopted was broadly approved in that, of the 71 States involved in the universal conference of plenipotentiaries that had adopted the Convention, 68 States had voted in favour, three had abstained and none had voted against. It was pointed out that the Hamburg Rules constituted an important part of the national laws of those States that adhered to the Convention and there was no initiative from those States for a modification. While it was recognized that States were, of course, free to adopt whichever liability system they preferred, it was suggested with particular emphasis that, in order to overcome the current

unsatisfactory situation, the Hamburg Rules should be adopted broadly within a short space of time, which would allow the functioning of the system to be monitored and new solutions to be added if and when they were necessary as a result of developments in practice and new transport techniques.

251. The Commission heard a statement on behalf of the Comité Maritime International (CMI) informing the Commission of the concern of CMI about the lack of harmony in the legal regime governing the carriage of goods by sea, about the considerations within the Executive Council of CMI of the problems arising therefrom and about the interest of CMI in working together with the Commission towards a solution that would produce uniformity of law. The Commission expressed its appreciation for the statement and welcomed the prospect of cooperation with CMI.

252. Emphasis was placed on the need for the Secretary-General to increase efforts to promote wider adherence to the Hamburg Rules, including by disseminating information and in-depth explanations about the benefits to be drawn from adherence to the Hamburg Rules for all participants in the carriage of goods by sea.

XI. RELEVANT GENERAL ASSEMBLY RESOLUTION AND OTHER BUSINESS

A. General Assembly resolution on the work of the Commission

253. The Commission took note with appreciation of General Assembly resolution 48/32 of 9 December 1993 on the report of the United Nations Commission on International Trade Law on the work of its twenty-sixth session. In particular, the Commission noted that, in paragraph 5 of that resolution, the General Assembly had requested the Secretary-General to establish a separate trust fund for the Commission to grant travel assistance to developing countries that were members of the Commission, at their request and in consultation with the Secretary-General. It was observed in that regard that the trust fund was in the process of being established and that Member States would be informed once the process of establishment was finalized.

254. The Commission also took note of the outcome with regard to the holding of consecutive meetings of the Commission's working groups, which had been recommended by the General Assembly in paragraph 13 of its resolution 47/34 of 25 November 1992 and had been discussed by the Commission at its twenty-sixth session. It was observed that, as a result of scheduling by the Office of Conference Services of the United Nations Secretariat, two instances of consecutive meetings had been held, one involving a four-week period and the other a six-week period. It was observed that the experience at those sessions had brought out the disadvantages of holding consecutive meetings of different working groups to the work of the Commission, disadvantages that had been discussed at the twenty-sixth session of the Commission. 13/

255. The Commission also took the opportunity to confirm the need to continue with the preparation of summary records for the portions of the session of the Commission at which legal texts were being considered for adoption, as the summary records were an important part of the *travaux préparatoires*.

B. Bibliography

256. The Commission noted with appreciation the bibliography of recent writings related to the work of the Commission (A/CN.9/402).

C. Date and place of the twenty-eighth session of the Commission

257. It was decided that the Commission would hold its twenty-eighth session from 2 to 26 May 1995 at Vienna, which duration was considered necessary in view of the expectation that three draft legal texts would be submitted to the Commission for finalization and adoption.

D. Sessions of working groups

258. It was decided that the Working Group on International Contract Practices would hold its twenty-second session from 19 to 30 September 1994 at Vienna and, in the event that an additional session was necessary, the twenty-third session from 9 to 20 January 1995 in New York.

259. It was decided that the Working Group on Electronic Data Interchange would hold its twenty-eighth session from 3 to 14 October 1994 at Vienna and its twenty-ninth session from 27 February to 10 March 1995 in New York.

Notes

1/ Pursuant to General Assembly resolution 2205 (XXI), the members of the Commission are elected for a term of six years. Of the current membership, 17 were elected by the Assembly at its forty-third session on 19 October 1988 (decision 43/307) and 19 were elected at its forty-sixth session on 4 November 1991 (decision 46/309). Pursuant to resolution 31/99 of 15 December 1976, the term of those members elected by the Assembly at its forty-third session will expire on the last day prior to the opening of the twenty-eighth regular annual session of the Commission, in 1995, while the term of those members elected at its forty-sixth session will expire on the last day prior to the opening of the thirty-first session of the Commission, in 1998.

2/ The election of the Chairman took place at the 520th meeting, on 31 May 1994, the election of the Vice-Chairmen at the 534th meeting, on 9 June 1994, and the election of the Rapporteur took place at the 526th meeting, on 4 June 1994. In accordance with a decision taken by the Commission at its first session, the Commission has three Vice-Chairmen, so that, together with the Chairman and the Rapporteur, each of the five groups of States listed in General Assembly resolution 2205 (XXI), section II, paragraph 1, will be represented on the bureau of the Commission (see the report of the United Nations Commission on International Trade Law on the work of its first session, *Official Records of the General Assembly, Twenty-third Session, Supplement No. 16* (A/7216), para. 14 (*Yearbook of the United Nations Commission on International Trade Law, vol. I: 1968-1970*; United Nations publication, Sales No. E.71.V.1), part two, I, A, para. 14)).

3/ *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 17* (A/47/17), annex I.

4/ The following table indicates new article numbers assigned to the provisions of the UNCITRAL Model Law on Procurement of Goods, Construction and Services upon adoption by the Commission, the articles as they were presented in the draft Model Law before the Commission and also as they appear in the previous Model Law on Procurement of Goods and Construction.

Number of article in Model Law	Number of draft article before the Commission	Number of article in previous Model Law
Preamble	Preamble	Preamble
1	1	1
2	2	2
3	3	3
4	4	4
5	5	5
6	6	6
7	7	7
8	8	8
9	9	9
10	10	10
11 (1) (a) to (i)	11 (1) (a) to (i)	11 (a) to (i)
11 (1) (J)	11 (1) (1) *bis*	-

Number of article in Model Law	Number of draft article before the Commission	Number of article in previous Model Law
11 (1) (K)	-	-
11 (1) (L) and M	11 (1) (J) and K	11 (1) (J) and K
12	11 *bis*	33
13	11 *ter*	-
14	12	12
15	13	13
16	14	14
17	15	15
18	16	16
19	17	17
20	18	18
21	19	19
22	20	20
23	21	21
24	22	22
25	23	23
26	24	24
27	25	25
28	26	26
29	27	27
30	28	28
31	29	29
32	30	30
33	31	31
34	32	32
35	34	34
36	35	35
37	41 *bis*	-
38	41 *ter*	-
39	41 *quater*	-
40	41 *quinquies*	-
41	41 *sexies* (1)	-
42	41 *sexies* (2)	-
43	41 *sexies* (3)	-
44	41 *sexies* (4)	-
45	41 *septies*	-
46	36	36
47	37	37
48	38	38
49	39	39
50	40	40
51	41	41
52 (a)	42 (a)	42 (a)
52 (b)	42 (a *bis*)	-
52 (c) - (f)	42 (b) - (e)	42 (b) - (e)
53	43	43
54	44	44
55	45	45
56	46	46
57	47	47

5/ *Official Records of the General Assembly, Forty-eighth Session, Supplement No. 17* (A/48/17), paras. 291-296.

6/ Ibid., paras. 293 and 296.

7/ Ibid., Forty-fourth Session, Supplement No. 17 (A/44/17), para. 244.

8/ Ibid., Forty-seventh Session, Supplement No. 17 (A/47/17), paras. 140-148.

9/ Ibid., Forty-eighth Session, Supplement No. 17 (A/48/17), paras. 263-268.

10/ For background information on CLOUT, see A/CN.9/267; Official Records of the General Assembly, Fortieth Session, Supplement No. 17 (A/40/17), para. 377; A/CN.9/312; and Official Records of the General Assembly, Forty-third Session, Supplement No. 17 (A/43/17), paras. 98-109.

11/ Official Records of the General Assembly, Forty-third Session, Supplement No. 17 (A/43/17), para. 103.

12/ Ibid., Forty-eighth Session, Supplement No. 17 (A/48/17), paras. 302-306.

13/ Ibid., paras. 340 and 341.

ANNEX I

[Original: Arabic/Chinese/English/
French/Russian/Spanish]

UNCITRAL Model Law on Procurement of Goods, Construction and Services*

Preamble

WHEREAS the [Government] [Parliament] of ... considers it desirable to regulate procurement of goods, construction and services so as to promote the objectives of:

(a) Maximizing economy and efficiency in procurement;

(b) Fostering and encouraging participation in procurement proceedings by suppliers and contractors, especially where appropriate, participation by suppliers and contractors regardless of nationality, and thereby promoting international trade;

(c) Promoting competition among suppliers and contractors for the supply of the goods, construction or services to be procured;

(d) Providing for the fair and equitable treatment of all suppliers and contractors;

(e) Promoting the integrity of, and fairness and public confidence in, the procurement process; and

(f) Achieving transparency in the procedures relating to procurement,

Be it therefore enacted as follows.

CHAPTER I. GENERAL PROVISIONS

Article 1. Scope of application

(1) This Law applies to all procurement by procuring entities, except as otherwise provided by paragraph (2) of this article.

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* The UNCITRAL Model Law on Procurement of Goods, Construction and Services was adopted by the United Nations Commission on International Trade Law (UNCITRAL) at its twenty-seventh session, without thereby superseding the UNCITRAL Model Law on Procurement of Goods and Construction, adopted by the Commission at its twenty-sixth session. The present consolidated text consists of the provisions found in the Model Law on Procurement of Goods and Construction and provisions on procurement of services. The Commission has also issued a Guide to Enactment of the UNCITRAL Model Law on Procurement of Goods, Construction and Services (A/CN.9/403).

(2) Subject to the provisions of paragraph (3) of this article, this Law does not apply to:

(a) Procurement involving national defence or national security;

(b) ... (the enacting State may specify in this Law additional types of procurement to be excluded); or

(c) Procurement of a type excluded by the procurement regulations.

(3) This Law applies to the types of procurement referred to in paragraph (2) of this article where and to the extent that the procuring entity expressly so declares to suppliers or contractors when first soliciting their participation in the procurement proceedings.

* * *

Article 2. Definitions

For the purposes of this Law:

(a) "Procurement" means the acquisition by any means of goods, construction or services;

(b) "Procuring entity" means:

(i) Option I for subparagraph (i)

Any governmental department, agency, organ or other unit, or any subdivision thereof, in this State that engages in procurement, except ...; (and)

Option II for subparagraph (i)

Any department, agency, organ or other unit, or any subdivision thereof, of the ("Government" or other term used to refer to the national Government of the enacting State) that engages in procurement, except ...; (and)

(ii) (The enacting State may insert in this subparagraph and, if necessary, in subsequent subparagraphs, other entities or enterprises, or categories thereof, to be included in the definition of "procuring entity");

(c) "Goods" means objects of every kind and description including raw materials, products and equipment and objects in solid, liquid or gaseous form, and electricity, as well as services incidental to the supply of the goods if the value of those incidental services does not exceed that of the goods themselves; (the enacting State may include additional categories of goods)

(d) "Construction" means all work associated with the construction, reconstruction, demolition, repair or renovation of a building, structure or works, such as site preparation, excavation, erection, building, installation of equipment or materials, decoration and finishing, as well as services incidental to construction such as drilling, mapping, satellite photography, seismic investigations and similar services provided pursuant to the procurement contract, if the value of those services does not exceed that of the construction itself;

(e) "Services" means any object of procurement other than goods or construction; (the enacting State may specify certain objects of procurement which are to be treated as services)

(f) "Supplier or contractor" means, according to the context, any potential party or the party to a procurement contract with the procuring entity;

(g) "Procurement contract" means a contract between the procuring entity and a supplier or contractor resulting from procurement proceedings;

(h) "Tender security" means a security provided to the procuring entity to secure the fulfilment of any obligation referred to in article 32 (1) (f) and includes such arrangements as bank guarantees, surety bonds, stand-by letters of credit, cheques on which a bank is primarily liable, cash deposits, promissory notes and bills of exchange;

(i) "Currency" includes monetary unit of account.

* * *

Article 3. International obligations of this State relating to procurement [and intergovernmental agreements within (this State)]

To the extent that this Law conflicts with an obligation of this State under or arising out of any

(a) Treaty or other form of agreement to which it is a party with one or more other States,

(b) Agreement entered into by this State with an intergovernmental international financing institution, or

(c) Agreement between the federal Government of [name of federal State] and any subdivision or subdivisions of [name of federal State], or between any two or more such subdivisions,

the requirements of the treaty or agreement shall prevail; but in all other respects, the procurement shall be governed by this Law.

* * *

Article 4. Procurement regulations

The ... (the enacting State specifies the organ or authority authorized to promulgate the procurement regulations) is authorized to promulgate procurement regulations to fulfil the objectives and to carry out the provisions of this Law.

* * *

Article 5. Public accessibility of legal texts

The text of this Law, procurement regulations and all administrative rulings and directives of general application in connection with procurement covered by this Law, and all amendments thereof, shall be promptly made accessible to the public and systematically maintained.

* * *

Article 6. Qualifications of suppliers and contractors

(1) (a) This article applies to the ascertainment by the procuring entity of the qualifications of suppliers or contractors at any stage of the procurement proceedings;

(b) In order to participate in procurement proceedings, suppliers or contractors must qualify by meeting such of the following criteria as the procuring entity considers appropriate in the particular procurement proceedings:

(i) That they possess the necessary professional and technical qualifications, professional and technical competence, financial resources, equipment and other physical facilities, managerial capability, reliability, experience, and reputation, and the personnel, to perform the procurement contract;

(ii) That they have legal capacity to enter into the procurement contract;

(iii) That they are not insolvent, in receivership, bankrupt or being wound up, their affairs are not being administered by a court or a judicial officer, their business activities have not been suspended, and they are not the subject of legal proceedings for any of the foregoing;

(iv) That they have fulfilled their obligations to pay taxes and social security contributions in this State;

(v) That they have not, and their directors or officers have not, been convicted of any criminal offence related to their professional conduct or the making of false statements or misrepresentations as to their qualifications to enter into a procurement contract within a period of ... years (the enacting State specifies the period of time) preceding the commencement of the procurement proceedings, or have not been otherwise disqualified pursuant to administrative suspension or disbarment proceedings.

(2) Subject to the right of suppliers or contractors to protect their intellectual property or trade secrets, the procuring entity may require suppliers or contractors participating in procurement proceedings to provide such appropriate documentary evidence or other information as it may deem useful to satisfy itself that the suppliers or contractors are qualified in accordance with the criteria referred to in paragraph (1) (b).

(3) Any requirement established pursuant to this article shall be set forth in the prequalification documents, if any, and in the solicitation documents or other documents for solicitation of proposals, offers or quotations, and shall apply equally to all suppliers or contractors. A procuring entity shall impose

no criterion, requirement or procedure with respect to the qualifications of suppliers or contractors other than those provided for in this article.

(4) The procuring entity shall evaluate the qualifications of suppliers or contractors in accordance with the qualification criteria and procedures set forth in the prequalification documents, if any, and in the solicitation documents or other documents for solicitation of proposals, offers or quotations.

(5) Subject to articles 8 (1), 34 (4) (d) and 39 (2), the procuring entity shall establish no criterion, requirement or procedure with respect to the qualifications of suppliers or contractors that discriminates against or among suppliers or contractors or against categories thereof on the basis of nationality, or that is not objectively justifiable.

(6) (a) The procuring entity shall disqualify a supplier or contractor if it finds at any time that the information submitted concerning the qualifications of the supplier or contractor was false;

(b) A procuring entity may disqualify a supplier or contractor if it finds at any time that the information submitted concerning the qualifications of the supplier or contractor was materially inaccurate or materially incomplete;

(c) Other than in a case to which subparagraph (a) of this paragraph applies, a procuring entity may not disqualify a supplier or contractor on the ground that information submitted concerning the qualifications of the supplier or contractor was inaccurate or incomplete in a non-material respect. The supplier or contractor may be disqualified if it fails to remedy such deficiencies promptly upon request by the procuring entity.

* * *

Article 7. Prequalification proceedings

(1) The procuring entity may engage in prequalification proceedings with a view towards identifying, prior to the submission of tenders, proposals or offers in procurement proceedings conducted pursuant to chapter III, IV or V, suppliers and contractors that are qualified. The provisions of article 6 shall apply to prequalification proceedings.

(2) If the procuring entity engages in prequalification proceedings, it shall provide a set of prequalification documents to each supplier or contractor that requests them in accordance with the invitation to prequalify and that pays the price, if any, charged for those documents. The price that the procuring entity may charge for the prequalification documents shall reflect only the cost of printing them and providing them to suppliers or contractors.

(3) The prequalification documents shall include, at a minimum:

(a) The following information:

(i) Instructions for preparing and submitting prequalification applications;

(ii) A summary of the principal required terms and conditions of the procurement contract to be entered into as a result of the procurement proceedings;

(iii) Any documentary evidence or other information that must be submitted by suppliers or contractors to demonstrate their qualifications;

(iv) The manner and place for the submission of applications to prequalify and the deadline for the submission, expressed as a specific date and time and allowing sufficient time for suppliers or contractors to prepare and submit their applications, taking into account the reasonable needs of the procuring entity;

(v) Any other requirements that may be established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and submission of applications to prequalify and to the prequalification proceedings; and

(b) (i) In proceedings under chapter III, the information required to be specified in the invitation to tender by article 25 (1) (a) to (e), (h) and, if already known, (j);

(ii) In proceedings under chapter IV, the information referred to in article 38 (a), (c), if already known, (g), (p) and (s).

(4) The procuring entity shall respond to any request by a supplier or contractor for clarification of the prequalification documents that is received by the procuring entity within a reasonable time prior to the deadline for the submission of applications to prequalify. The response by the procuring entity shall be given within a reasonable time so as to enable the supplier or contractor to make a timely submission of its application to prequalify. The response to any request that might reasonably be expected to be of interest to other suppliers or contractors shall, without identifying the source of the request, be communicated to all suppliers or contractors to which the procuring entity provided the prequalification documents.

(5) The procuring entity shall make a decision with respect to the qualifications of each supplier or contractor submitting an application to prequalify. In reaching that decision, the procuring entity shall apply only the criteria set forth in the prequalification documents.

(6) The procuring entity shall promptly notify each supplier or contractor submitting an application to prequalify whether or not it has been prequalified and shall make available to any member of the general public, upon request, the names of all suppliers or contractors that have been prequalified. Only suppliers or contractors that have been prequalified are entitled to participate further in the procurement proceedings.

(7) The procuring entity shall upon request communicate to suppliers or contractors that have not been prequalified the grounds therefor, but the procuring entity is not required to specify the evidence or give the reasons for its finding that those grounds were present.

(8) The procuring entity may require a supplier or contractor that has been prequalified to demonstrate again its qualifications in accordance with the same criteria used to prequalify such supplier or contractor. The procuring entity shall disqualify any supplier or contractor that fails to demonstrate again its qualifications if requested to do so. The procuring entity shall promptly notify each supplier or contractor requested to demonstrate again its

qualifications as to whether or not the supplier or contractor has done so to the satisfaction of the procuring entity.

* * *

Article 8. Participation by suppliers or contractors

(1) Suppliers or contractors are permitted to participate in procurement proceedings without regard to nationality, except in cases in which the procuring entity decides, on grounds specified in the procurement regulations or according to other provisions of law, to limit participation in procurement proceedings on the basis of nationality.

(2) A procuring entity that limits participation on the basis of nationality pursuant to paragraph (1) of this article shall include in the record of the procurement proceedings a statement of the grounds and circumstances on which it relied.

(3) The procuring entity, when first soliciting the participation of suppliers or contractors in the procurement proceedings, shall declare to them that they may participate in the procurement proceedings regardless of nationality, a declaration which may not later be altered. However, if it decides to limit participation pursuant to paragraph (1) of this article, it shall so declare to them.

* * *

Article 9. Form of communications

(1) Subject to other provisions of this Law and any requirement of form specified by the procuring entity when first soliciting the participation of suppliers or contractors in the procurement proceedings, documents, notifications, decisions and other communications referred to in this Law to be submitted by the procuring entity or administrative authority to a supplier or contractor or by a supplier or contractor to the procuring entity shall be in a form that provides a record of the content of the communication.

(2) Communications between suppliers or contractors and the procuring entity referred to in articles 7 (4) and (6), 12 (3), 31 (2) (a), 32 (1) (d), 34 (1), 36 (1), 37 (3), 44 (b) to (f) and 47 (1) may be made by a means of communication that does not provide a record of the content of the communication provided that, immediately thereafter, confirmation of the communication is given to the recipient of the communication in a form which provides a record of the confirmation.

(3) The procuring entity shall not discriminate against or among suppliers or contractors on the basis of the form in which they transmit or receive documents, notifications, decisions or other communications.

* * *

Article 10. Rules concerning documentary evidence provided by suppliers or contractors

If the procuring entity requires the legalization of documentary evidence provided by suppliers or contractors to demonstrate their qualifications in procurement proceedings, the procuring entity shall not impose any requirements as to the legalization of the documentary evidence other than those provided for in the laws of this State relating to the legalization of documents of the type in question.

* * *

Article 11. Record of procurement proceedings

(1) The procuring entity shall maintain a record of the procurement proceedings containing, at a minimum, the following information:

(a) A brief description of the goods, construction or services to be procured, or of the procurement need for which the procuring entity requested proposals or offers;

(b) The names and addresses of suppliers or contractors that submitted tenders, proposals, offers or quotations, and the name and address of the supplier or contractor with whom the procurement contract is entered into and the contract price;

(c) Information relative to the qualifications, or lack thereof, of suppliers or contractors that submitted tenders, proposals, offers or quotations;

(d) The price, or the basis for determining the price, and a summary of the other principal terms and conditions of each tender, proposal, offer or quotation and of the procurement contract, where these are known to the procuring entity;

(e) A summary of the evaluation and comparison of tenders, proposals, offers or quotations, including the application of any margin of preference pursuant to articles 34 (4) (d) and 39 (2);

(f) If all tenders, proposals, offers or quotations were rejected pursuant to article 12, a statement to that effect and the grounds therefor, in accordance with article 12 (1);

(g) If, in procurement proceedings involving methods of procurement other than tendering, those proceedings did not result in a procurement contract, a statement to that effect and of the grounds therefor;

(h) The information required by article 15, if a tender, proposal, offer or quotation was rejected pursuant to that provision;

(i) In procurement proceedings involving the use of a procurement method pursuant to paragraph (2) or subparagraph (a) or (b) of paragraph (3) of article 18, the statement required under article 18 (4) of the grounds and circumstances on which the procuring entity relied to justify the selection of the method of procurement used;

(j) In the procurement of services by means of chapter IV, the statement required under article 41 (2) of the grounds and circumstances on which the procuring entity relied to justify the selection procedure used;

(k) In procurement proceedings involving direct solicitation of proposals for services in accordance with article 37 (3), a statement of the grounds and circumstances on which the procuring entity relied to justify the direct solicitation;

(l) In procurement proceedings in which the procuring entity, in accordance with article 8 (1), limits participation on the basis of nationality, a statement of the grounds and circumstances relied upon by the procuring entity for imposing the limitation;

(m) A summary of any requests for clarification of the prequalification or solicitation documents, the responses thereto, as well as a summary of any modification of those documents.

(2) Subject to article 33 (3), the portion of the record referred to in subparagraphs (a) and (b) of paragraph (1) of this article shall, on request, be made available to any person after a tender, proposal, offer or quotation, as the case may be, has been accepted or after procurement proceedings have been terminated without resulting in a procurement contract.

(3) Subject to article 33 (3), the portion of the record referred to in subparagraphs (c) to (g), and (m), of paragraph (1) of this article shall, on request, be made available to suppliers or contractors that submitted tenders, proposals, offers or quotations, or applied for prequalification, after a tender, proposal, offer or quotation has been accepted or procurement proceedings have been terminated without resulting in a procurement contract. Disclosure of the portion of the record referred to in subparagraphs (c) to (e), and (m), may be ordered at an earlier stage by a competent court. However, except when ordered to do so by a competent court, and subject to the conditions of such an order, the procuring entity shall not disclose:

(a) Information if its disclosure would be contrary to law, would impede law enforcement, would not be in the public interest, would prejudice legitimate commercial interests of the parties or would inhibit fair competition;

(b) Information relating to the examination, evaluation and comparison of tenders, proposals, offers or quotations, and tender, proposal, offer or quotation prices, other than the summary referred to in paragraph (1) (e).

(4) The procuring entity shall not be liable to suppliers or contractors for damages owing solely to a failure to maintain a record of the procurement proceedings in accordance with the present article.

* * *

Article 12. Rejection of all tenders, proposals, offers or quotations

(1) (Subject to approval by ... (the enacting State designates an organ to issue the approval)), and if so specified in the solicitation documents or other documents for solicitation of proposals, offers or quotations, the procuring entity may reject all tenders, proposals, offers or quotations at any time prior to the acceptance of a tender, proposal, offer or quotation. The procuring entity shall upon request communicate to any supplier or contractor that submitted a tender, proposal, offer or quotation, the grounds for its rejection of all tenders, proposals, offers or quotations, but is not required to justify those grounds.

(2) The procuring entity shall incur no liability, solely by virtue of its invoking paragraph (1) of this article, towards suppliers or contractors that have submitted tenders, proposals, offers or quotations.

(3) Notice of the rejection of all tenders, proposals, offers or quotations shall be given promptly to all suppliers or contractors that submitted tenders, proposals, offers or quotations.

* * *

Article 13. Entry into force of the procurement contract

(1) In tendering proceedings, acceptance of the tender and entry into force of the procurement contract shall be carried out in accordance with article 36.

(2) In all the other methods of procurement, the manner of entry into force of the procurement contract shall be notified to the suppliers or contractors at the time that proposals, offers or quotations are requested.

* * *

Article 14. Public notice of procurement contract awards

(1) The procuring entity shall promptly publish notice of procurement contract awards.

(2) The procurement regulations may provide for the manner of publication of the notice required by paragraph (1).

(3) Paragraph (1) is not applicable to awards where the contract price is less than [...].

* * *

Article 15. Inducements from suppliers or contractors

(Subject to approval by ... (the enacting State designates an organ to issue the approval),) a procuring entity shall reject a tender, proposal, offer or quotation if the supplier or contractor that submitted it offers, gives or agrees to give, directly or indirectly, to any current or former officer or employee of the procuring entity or other governmental authority a gratuity in any form, an offer of employment or any other thing of service or value, as an inducement with respect to an act or decision of, or procedure followed by, the procuring entity in connection with the procurement proceedings. Such rejection of the tender, proposal, offer or quotation and the reasons therefor shall be recorded in the record of the procurement proceedings and promptly communicated to the supplier or contractor.

* * *

Article 16. Rules concerning description of goods, construction or services

(1) Any specifications, plans, drawings and designs setting forth the technical or quality characteristics of the goods, construction or services to be procured, and requirements concerning testing and test methods, packaging, marking or labelling or conformity certification, and symbols and terminology, or description of services, that create obstacles to participation, including

obstacles based on nationality, by suppliers or contractors in the procurement proceedings shall not be included or used in the prequalification documents, solicitation documents or other documents for solicitation of proposals, offers or quotations.

(2) To the extent possible, any specifications, plans, drawings, designs and requirements or descriptions of goods, construction or services shall be based on the relevant objective technical and quality characteristics of the goods, construction or services to be procured. There shall be no requirement of or reference to a particular trade mark, name, patent, design, type, specific origin or producer unless there is no other sufficiently precise or intelligible way of describing the characteristics of the goods, construction or services to be procured and provided that words such as "or equivalent" are included.

(3) (a) Standardized features, requirements, symbols and terminology relating to the technical and quality characteristics of the goods, construction or services to be procured shall be used, where available, in formulating any specifications, plans, drawings and designs to be included in the prequalification documents, solicitation documents or other documents for solicitation of proposals, offers or quotations;

(b) Due regard shall be had for the use of standardized trade terms, where available, in formulating the terms and conditions of the procurement contract to be entered into as a result of the procurement proceedings and in formulating other relevant aspects of the prequalification documents, solicitation documents or other documents for solicitation of proposals, offers or quotations.

* * *

Article 17. Language

The prequalification documents, solicitation documents and other documents for solicitation of proposals, offers or quotations shall be formulated in ... (the enacting State specifies its official language or languages) (and in a language customarily used in international trade except where:

(a) The procurement proceedings are limited solely to domestic suppliers or contractors pursuant to article 8 (1), or

(b) The procuring entity decides, in view of the low value of the goods, construction or services to be procured, that only domestic suppliers or contractors are likely to be interested).

CHAPTER II. METHODS OF PROCUREMENT AND THEIR CONDITIONS FOR USE

Article 18. Methods of procurement*

(1) Except as otherwise provided by this chapter, a procuring entity engaging in procurement of goods or construction shall do so by means of tendering proceedings.

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* States may choose not to incorporate all these methods of procurement into their national legislation. On this question, see Guide to Enactment of the UNCITRAL Model Law on Procurement of Goods, Construction and Services (A/CN.9/403).

(2) In the procurement of goods and construction, a procuring entity may use a method of procurement other than tendering proceedings only pursuant to article 19, 20, 21 or 22.

(3) In the procurement of services, a procuring entity shall use the method of procurement set forth in chapter IV, unless the procuring entity determines that:

(a) It is feasible to formulate detailed specifications and tendering proceedings would be more appropriate taking into account the nature of the services to be procured; or

(b) It would be more appropriate (, subject to approval by ... (the enacting State designates an organ to issue the approval),) to use a method of procurement referred to in articles 19 to 22, provided that the conditions for the use of that method are satisfied.

(4) If the procuring entity uses a method of procurement pursuant to paragraph (2) or subparagraph (a) or (b) of paragraph (3), it shall include in the record required under article 11 a statement of the grounds and circumstances on which it relied to justify the use of that method.

* * *

Article 19. Conditions for use of two-stage tendering, request for proposals or competitive negotiation

(1) (Subject to approval by ... (the enacting State designates an organ to issue the approval),) a procuring entity may engage in procurement by means of two-stage tendering in accordance with article 46, or request for proposals in accordance with article 48, or competitive negotiation in accordance with article 49, in the following circumstances:

(a) It is not feasible for the procuring entity to formulate detailed specifications for the goods or construction or, in the case of services, to identify their characteristics and, in order to obtain the most satisfactory solution to its procurement needs,

(i) It seeks tenders, proposals or offers as to various possible means of meeting its needs; or,

(ii) Because of the technical character of the goods or construction, or because of the nature of the services, it is necessary for the procuring entity to negotiate with suppliers or contractors;

(b) When the procuring entity seeks to enter into a contract for the purpose of research, experiment, study or development, except where the contract includes the production of goods in quantities sufficient to establish their commercial viability or to recover research and development costs;

(c) When the procuring entity applies this Law, pursuant to article 1 (3), to procurement involving national defence or national security and determines that the selected method is the most appropriate method of procurement; or

(d) When tendering proceedings have been engaged in but no tenders were submitted or all tenders were rejected by the procuring entity pursuant to article 12, 15 or 34 (3), and when, in the judgement of the procuring entity, engaging in new tendering proceedings would be unlikely to result in a procurement contract.

(2) (Subject to approval by ... (the enacting State designates an organ to issue the approval),) the procuring entity may engage in procurement by means of competitive negotiation also when:

(a) There is an urgent need for the goods, construction or services, and engaging in tendering proceedings would therefore be impractical, provided that the circumstances giving rise to the urgency were neither foreseeable by the procuring entity nor the result of dilatory conduct on its part; or,

(b) Owing to a catastrophic event, there is an urgent need for the goods, construction or services, making it impractical to use other methods of procurement because of the time involved in using those methods.

* * *

Article 20. Conditions for use of restricted tendering

(Subject to approval by ... (the enacting State designates an organ to issue the approval),) the procuring entity may, where necessary for reasons of economy and efficiency, engage in procurement by means of restricted tendering in accordance with article 47, when:

(a) The goods, construction or services, by reason of their highly complex or specialized nature, are available only from a limited number of suppliers or contractors; or

(b) The time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the goods, construction or services to be procured.

* * *

Article 21. Conditions for use of request for quotations

(1) (Subject to approval by ... (the enacting State designates an organ to issue the approval),) a procuring entity may engage in procurement by means of a request for quotations in accordance with article 50 for the procurement of readily available goods or services that are not specially produced or provided to the particular specifications of the procuring entity and for which there is an established market, so long as the estimated value of the procurement contract is less than the amount set forth in the procurement regulations.

(2) A procuring entity shall not divide its procurement into separate contracts for the purpose of invoking paragraph (1) of this article.

* * *

Article 22. Conditions for use of single-source procurement

(1) (Subject to approval by ... (the enacting State designates an organ to issue the approval),) a procuring entity may engage in single-source procurement in accordance with article 51 when:

(a) The goods, construction or services are available only from a particular supplier or contractor, or a particular supplier or contractor has exclusive rights in respect of the goods, construction or services, and no reasonable alternative or substitute exists;

(b) There is an urgent need for the goods, construction or services, and engaging in tendering proceedings or any other method of procurement would therefore be impractical, provided that the circumstances giving rise to the urgency were neither foreseeable by the procuring entity nor the result of dilatory conduct on its part;

(c) Owing to a catastrophic event, there is an urgent need for the goods, construction or services, making it impractical to use other methods of procurement because of the time involved in using those methods;

(d) The procuring entity, having procured goods, equipment, technology or services from a supplier or contractor, determines that additional supplies must be procured from that supplier or contractor for reasons of standardization or because of the need for compatibility with existing goods, equipment, technology or services, taking into account the effectiveness of the original procurement in meeting the needs of the procuring entity, the limited size of the proposed procurement in relation to the original procurement, the reasonableness of the price and the unsuitability of alternatives to the goods or services in question;

(e) The procuring entity seeks to enter into a contract with the supplier or contractor for the purpose of research, experiment, study or development, except where the contract includes the production of goods in quantities to establish their commercial viability or to recover research and development costs; or

(f) The procuring entity applies this Law, pursuant to article 1 (3), to procurement involving national defence or national security and determines that single-source procurement is the most appropriate method of procurement.

(2) Subject to approval by ... (the enacting State designates an organ to issue the approval), and following public notice and adequate opportunity to comment, a procuring entity may engage in single-source procurement when procurement from a particular supplier or contractor is necessary in order to promote a policy specified in article 34 (4) (c) (iii) or 39 (1) (d), provided that procurement from no other supplier or contractor is capable of promoting that policy.

* * *

CHAPTER III. TENDERING PROCEEDINGS

SECTION I. SOLICITATION OF TENDERS AND OF APPLICATIONS TO PREQUALIFY

Article 23. Domestic tendering

In procurement proceedings in which

(a) Participation is limited solely to domestic suppliers or contractors pursuant to article 8 (1), or

(b) The procuring entity decides, in view of the low value of the goods, construction or services to be procured, that only domestic suppliers or contractors are likely to be interested in submitting tenders,

the procuring entity shall not be required to employ the procedures set out in articles 24 (2), 25 (1) (h), 25 (1) (i), 25 (2) (c), 25 (2) (d), 27 (j), 27 (k), 27 (s) and 32 (1) (c) of this Law.

* * *

Article 24. Procedures for soliciting tenders or applications to prequalify

(1) A procuring entity shall solicit tenders or, where applicable, applications to prequalify by causing an invitation to tender or an invitation to prequalify, as the case may be, to be published in ... (the enacting State specifies the official gazette or other official publication in which the invitation to tender or to prequalify is to be published).

(2) The invitation to tender or invitation to prequalify shall also be published, in a language customarily used in international trade, in a newspaper of wide international circulation or in a relevant trade publication or technical or professional journal of wide international circulation.

* * *

Article 25. Contents of invitation to tender and invitation to prequalify

(1) The invitation to tender shall contain, at a minimum, the following information:

(a) The name and address of the procuring entity;

(b) The nature and quantity, and place of delivery of the goods to be supplied, the nature and location of the construction to be effected, or the nature of the services and the location where they are to be provided;

(c) The desired or required time for the supply of the goods or for the completion of the construction, or the timetable for the provision of the services;

(d) The criteria and procedures to be used for evaluating the qualifications of suppliers or contractors, in conformity with article 6 (1) (b);

(e) A declaration, which may not later be altered, that suppliers or contractors may participate in the procurement proceedings regardless of nationality, or a declaration that participation is limited on the basis of nationality pursuant to article 8 (1), as the case may be;

(f) The means of obtaining the solicitation documents and the place from which they may be obtained;

(g) The price, if any, charged by the procuring entity for the solicitation documents;

(h) The currency and means of payment for the solicitation documents;

(i) The language or languages in which the solicitation documents are available;

(j) The place and deadline for the submission of tenders.

(2) An invitation to prequalify shall contain, at a minimum, the information referred to in paragraph (1) (a) to (e), (g), (h) and, if it is already known (j), as well as the following information:

(a) The means of obtaining the prequalification documents and the place from which they may be obtained;

(b) The price, if any, charged by the procuring entity for the prequalification documents;

(c) The currency and terms of payment for the prequalification documents;

(d) The language or languages in which the prequalification documents are available;

(e) The place and deadline for the submission of applications to prequalify.

* * *

Article 26. Provision of solicitation documents

The procuring entity shall provide the solicitation documents to suppliers or contractors in accordance with the procedures and requirements specified in the invitation to tender. If prequalification proceedings have been engaged in, the procuring entity shall provide a set of solicitation documents to each supplier or contractor that has been prequalified and that pays the price, if any, charged for those documents. The price that the procuring entity may charge for the solicitation documents shall reflect only the cost of printing them and providing them to suppliers or contractors.

* * *

Article 27. Contents of solicitation documents

The solicitation documents shall include, at a minimum, the following information:

(a) Instructions for preparing tenders;

(b) The criteria and procedures, in conformity with the provisions of article 6, relative to the evaluation of the qualifications of suppliers or contractors and relative to the further demonstration of qualifications pursuant to article 34 (6);

(c) The requirements as to documentary evidence or other information that must be submitted by suppliers or contractors to demonstrate their qualifications;

(d) The nature and required technical and quality characteristics, in conformity with article 16, of the goods, construction or services to be procured, including, but not limited to, technical specifications, plans, drawings and designs as appropriate; the quantity of the goods; any incidental services to be performed; the location where the construction is to be effected or the services are to be provided; and the desired or required time, if any, when the goods are to be delivered, the construction is to be effected or the services are to be provided;

(e) The criteria to be used by the procuring entity in determining the successful tender, including any margin of preference and any criteria other than price to be used pursuant to article 34 (4) (b), (c) or (d) and the relative weight of such criteria;

(f) The terms and conditions of the procurement contract, to the extent they are already known to the procuring entity, and the contract form, if any, to be signed by the parties;

(g) If alternatives to the characteristics of the goods, construction, services, contractual terms and conditions or other requirements set forth in the solicitation documents are permitted, a statement to that effect, and a description of the manner in which alternative tenders are to be evaluated and compared;

(h) If suppliers or contractors are permitted to submit tenders for only a portion of the goods, construction or services to be procured, a description of the portion or portions for which tenders may be submitted;

(i) The manner in which the tender price is to be formulated and expressed, including a statement as to whether the price is to cover elements other than the cost of the goods, construction or services themselves, such as any applicable transportation and insurance charges, customs duties and taxes;

(j) The currency or currencies in which the tender price is to be formulated and expressed;

(k) The language or languages, in conformity with article 29, in which tenders are to be prepared;

(l) Any requirements of the procuring entity with respect to the issuer and the nature, form, amount and other principal terms and conditions of any tender security to be provided by suppliers or contractors submitting tenders, and any such requirements for any security for the performance of the procurement contract to be provided by the supplier or contractor that enters into the procurement contract, including securities such as labour and materials bonds;

(m) If a supplier or contractor may not modify or withdraw its tender prior to the deadline for the submission of tenders without forfeiting its tender security, a statement to that effect;

(n) The manner, place and deadline for the submission of tenders, in conformity with article 30;

(o) The means by which, pursuant to article 28, suppliers or contractors may seek clarifications of the solicitation documents, and a statement as to whether the procuring entity intends, at this stage, to convene a meeting of suppliers or contractors;

(p) The period of time during which tenders shall be in effect, in conformity with article 31;

(q) The place, date and time for the opening of tenders, in conformity with article 33;

(r) The procedures to be followed for opening and examining tenders;

(s) The currency that will be used for the purpose of evaluating and comparing tenders pursuant to article 34 (5) and either the exchange rate that will be used for the conversion of tenders into that currency or a statement that the rate published by a specified financial institution prevailing on a specified date will be used;

(t) References to this Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings, provided, however, that the omission of any such reference shall not constitute grounds for review under article 52 or give rise to liability on the part of the procuring entity;

(u) The name, functional title and address of one or more officers or employees of the procuring entity who are authorized to communicate directly with and to receive communications directly from suppliers or contractors in connection with the procurement proceedings, without the intervention of an intermediary;

(v) Any commitments to be made by the supplier or contractor outside of the procurement contract, such as commitments relating to countertrade or to the transfer of technology;

(w) Notice of the right provided under article 52 of this Law to seek review of an unlawful act or decision of, or procedure followed by, the procuring entity in relation to the procurement proceedings;

(x) If the procuring entity reserves the right to reject all tenders pursuant to article 12, a statement to that effect;

(y) Any formalities that will be required once a tender has been accepted for a procurement contract to enter into force, including, where applicable, the execution of a written procurement contract pursuant to article 36, and approval by a higher authority or the Government and the estimated period of time following the dispatch of the notice of acceptance that will be required to obtain the approval;

(z) Any other requirements established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and submission of tenders and to other aspects of the procurement proceedings.

* * *

Article 28. Clarifications and modifications of solicitation documents

(1) A supplier or contractor may request a clarification of the solicitation documents from the procuring entity. The procuring entity shall respond to any request by a supplier or contractor for clarification of the solicitation documents that is received by the procuring entity within a reasonable time

prior to the deadline for the submission of tenders. The procuring entity shall respond within a reasonable time so as to enable the supplier or contractor to make a timely submission of its tender and shall, without identifying the source of the request, communicate the clarification to all suppliers or contractors to which the procuring entity has provided the solicitation documents.

(2) At any time prior to the deadline for submission of tenders, the procuring entity may, for any reason, whether on its own initiative or as a result of a request for clarification by a supplier or contractor, modify the solicitation documents by issuing an addendum. The addendum shall be communicated promptly to all suppliers or contractors to which the procuring entity has provided the solicitation documents and shall be binding on those suppliers or contractors.

(3) If the procuring entity convenes a meeting of suppliers or contractors, it shall prepare minutes of the meeting containing the requests submitted at the meeting for clarification of the solicitation documents, and its responses to those requests, without identifying the sources of the requests. The minutes shall be provided promptly to all suppliers or contractors to which the procuring entity provided the solicitation documents, so as to enable those suppliers or contractors to take the minutes into account in preparing their tenders.

* * *

SECTION II. SUBMISSION OF TENDERS

Article 29. Language of tenders

Tenders may be formulated and submitted in any language in which the solicitation documents have been issued or in any other language that the procuring entity specifies in the solicitation documents.

* * *

Article 30. Submission of tenders

(1) The procuring entity shall fix the place for, and a specific date and time as the deadline for, the submission of tenders.

(2) If, pursuant to article 28, the procuring entity issues a clarification or modification of the solicitation documents, or if a meeting of suppliers or contractors is held, it shall, prior to the deadline for the submission of tenders, extend the deadline if necessary to afford suppliers or contractors reasonable time to take the clarification or modification, or the minutes of the meeting, into account in their tenders.

(3) The procuring entity may, in its absolute discretion, prior to the deadline for the submission of tenders, extend the deadline if it is not possible for one or more suppliers or contractors to submit their tenders by the deadline owing to any circumstance beyond their control.

(4) Notice of any extension of the deadline shall be given promptly to each supplier or contractor to which the procuring entity provided the solicitation documents.

(5) (a) Subject to subparagraph (b), a tender shall be submitted in writing, signed and in a sealed envelope;

(b) Without prejudice to the right of a supplier or contractor to submit a tender in the form referred to in subparagraph (a), a tender may alternatively be submitted in any other form specified in the solicitation documents that provides a record of the content of the tender and at least a similar degree of authenticity, security and confidentiality;

(c) The procuring entity shall, on request, provide to the supplier or contractor a receipt showing the date and time when its tender was received.

(6) A tender received by the procuring entity after the deadline for the submission of tenders shall not be opened and shall be returned to the supplier or contractor that submitted it.

* * *

Article 31. Period of effectiveness of tenders; modification and withdrawal of tenders

(1) Tenders shall be in effect during the period of time specified in the solicitation documents.

(2) (a) Prior to the expiry of the period of effectiveness of tenders, the procuring entity may request suppliers or contractors to extend the period for an additional specified period of time. A supplier or contractor may refuse the request without forfeiting its tender security, and the effectiveness of its tender will terminate upon the expiry of the unextended period of effectiveness;

(b) Suppliers or contractors that agree to an extension of the period of effectiveness of their tenders shall extend or procure an extension of the period of effectiveness of tender securities provided by them or provide new tender securities to cover the extended period of effectiveness of their tenders. A supplier or contractor whose tender security is not extended, or that has not provided a new tender security, is considered to have refused the request to extend the period of effectiveness of its tender.

(3) Unless otherwise stipulated in the solicitation documents, a supplier or contractor may modify or withdraw its tender prior to the deadline for the submission of tenders without forfeiting its tender security. The modification or notice of withdrawal is effective if it is received by the procuring entity prior to the deadline for the submission of tenders.

* * *

Article 32. Tender securities

(1) When the procuring entity requires suppliers or contractors submitting tenders to provide a tender security:

(a) The requirement shall apply to all such suppliers or contractors;

(b) The solicitation documents may stipulate that the issuer of the tender security and the confirmer, if any, of the tender security, as well as the form and terms of the tender security, must be acceptable to the procuring entity;

(c) Notwithstanding the provisions of subparagraph (b) of this paragraph, a tender security shall not be rejected by the procuring entity on the grounds that the tender security was not issued by an issuer in this State if the tender security and the issuer otherwise conform to requirements set forth in the solicitation documents (, unless the acceptance by the procuring entity of such a tender security would be in violation of a law of this State);

(d) Prior to submitting a tender, a supplier or contractor may request the procuring entity to confirm the acceptability of a proposed issuer of a tender security, or of a proposed confirmer, if required; the procuring entity shall respond promptly to such a request;

(e) Confirmation of the acceptability of a proposed issuer or of any proposed confirmer does not preclude the procuring entity from rejecting the tender security on the ground that the issuer or the confirmer, as the case may be, has become insolvent or otherwise lacks creditworthiness;

(f) The procuring entity shall specify in the solicitation documents any requirements with respect to the issuer and the nature, form, amount and other principal terms and conditions of the required tender security; any requirement that refers directly or indirectly to conduct by the supplier or contractor submitting the tender shall not relate to conduct other than:

(i) Withdrawal or modification of the tender after the deadline for submission of tenders, or before the deadline if so stipulated in the solicitation documents;

(ii) Failure to sign the procurement contract if required by the procuring entity to do so;

(iii) Failure to provide a required security for the performance of the contract after the tender has been accepted or to comply with any other condition precedent to signing the procurement contract specified in the solicitation documents.

(2) The procuring entity shall make no claim to the amount of the tender security, and shall promptly return, or procure the return of, the tender security document, after whichever of the following that occurs earliest:

(a) The expiry of the tender security;

(b) The entry into force of a procurement contract and the provision of a security for the performance of the contract, if such a security is required by the solicitation documents;

(c) The termination of the tendering proceedings without the entry into force of a procurement contract;

(d) The withdrawal of the tender prior to the deadline for the submission of tenders, unless the solicitation documents stipulate that no such withdrawal is permitted.

* * *

SECTION III. EVALUATION AND COMPARISON OF TENDERS

Article 33. Opening of tenders

(1) Tenders shall be opened at the time specified in the solicitation documents as the deadline for the submission of tenders, or at the deadline specified in

any extension of the deadline, at the place and in accordance with the procedures specified in the solicitation documents.

(2) All suppliers or contractors that have submitted tenders, or their representatives, shall be permitted by the procuring entity to be present at the opening of tenders.

(3) The name and address of each supplier or contractor whose tender is opened and the tender price shall be announced to those persons present at the opening of tenders, communicated on request to suppliers or contractors that have submitted tenders but that are not present or represented at the opening of tenders, and recorded immediately in the record of the tendering proceedings required by article 11.

* * *

Article 34. Examination, evaluation and comparison of tenders

(1) (a) The procuring entity may ask suppliers or contractors for clarifications of their tenders in order to assist in the examination, evaluation and comparison of tenders. No change in a matter of substance in the tender, including changes in price and changes aimed at making an unresponsive tender responsive, shall be sought, offered or permitted;

(b) Notwithstanding subparagraph (a) of this paragraph, the procuring entity shall correct purely arithmetical errors that are discovered during the examination of tenders. The procuring entity shall give prompt notice of any such correction to the supplier or contractor that submitted the tender.

(2) (a) Subject to subparagraph (b) of this paragraph, the procuring entity may regard a tender as responsive only if it conforms to all requirements set forth in the tender solicitation documents;

(b) The procuring entity may regard a tender as responsive even if it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set forth in the solicitation documents or if it contains errors or oversights that are capable of being corrected without touching on the substance of the tender. Any such deviations shall be quantified, to the extent possible, and appropriately taken account of in the evaluation and comparison of tenders.

(3) The procuring entity shall not accept a tender:

(a) If the supplier or contractor that submitted the tender is not qualified;

(b) If the supplier or contractor that submitted the tender does not accept a correction of an arithmetical error made pursuant to paragraph (1) (b) of this article;

(c) If the tender is not responsive;

(d) In the circumstances referred to in article 15.

(4) (a) The procuring entity shall evaluate and compare the tenders that have been accepted in order to ascertain the successful tender, as defined in subparagraph (b) of this paragraph, in accordance with the procedures and

criteria set forth in the solicitation documents. No criterion shall be used that has not been set forth in the solicitation documents;

(b) The successful tender shall be:

(i) The tender with the lowest tender price, subject to any margin of preference applied pursuant to subparagraph (d) of this paragraph; or

(ii) If the procuring entity has so stipulated in the solicitation documents, the lowest evaluated tender ascertained on the basis of criteria specified in the solicitation documents, which criteria shall, to the extent practicable, be objective and quantifiable, and shall be given a relative weight in the evaluation procedure or be expressed in monetary terms wherever practicable;

(c) In determining the lowest evaluated tender in accordance with subparagraph (b) (ii) of this paragraph, the procuring entity may consider only the following:

(i) The tender price, subject to any margin of preference applied pursuant to subparagraph (d) of this paragraph;

(ii) The cost of operating, maintaining and repairing the goods or construction, the time for delivery of the goods, completion of construction or provision of the services, the functional characteristics of the goods or construction, the terms of payment and of guarantees in respect of the goods, construction or services;

(iii) The effect that acceptance of a tender would have on the balance of payments position and foreign exchange reserves of [this State], the countertrade arrangements offered by suppliers or contractors, the extent of local content, including manufacture, labour and materials, in goods, construction or services being offered by suppliers or contractors, the economic-development potential offered by tenders, including domestic investment or other business activity, the encouragement of employment, the reservation of certain production for domestic suppliers, the transfer of technology and the development of managerial, scientific and operational skills [... (the enacting State may expand subparagraph (iii) by including additional criteria)]; and

(iv) National defence and security considerations;

(d) If authorized by the procurement regulations, (and subject to approval by ... (the enacting State designates an organ to issue the approval),) in evaluating and comparing tenders a procuring entity may grant a margin of preference for the benefit of tenders for construction by domestic contractors or for the benefit of tenders for domestically produced goods or for the benefit of domestic suppliers of services. The margin of preference shall be calculated in accordance with the procurement regulations and reflected in the record of the procurement proceedings.

(5) When tender prices are expressed in two or more currencies, the tender prices of all tenders shall be converted to the same currency, and according to the rate specified in the solicitation documents pursuant to article 27 (s), for the purpose of evaluating and comparing tenders.

(6) Whether or not it has engaged in prequalification proceedings pursuant to article 7, the procuring entity may require the supplier or contractor submitting the tender that has been found to be the successful tender pursuant to paragraph (4) (b) of this article to demonstrate again its qualifications in accordance with criteria and procedures conforming to the provisions of article 6. The criteria and procedures to be used for such further demonstration shall be set forth in the solicitation documents. Where prequalification proceedings have been engaged in, the criteria shall be the same as those used in the prequalification proceedings.

(7) If the supplier or contractor submitting the successful tender is requested to demonstrate again its qualifications in accordance with paragraph (6) of this article but fails to do so, the procuring entity shall reject that tender and shall select a successful tender, in accordance with paragraph (4) of this article, from among the remaining tenders, subject to the right of the procuring entity, in accordance with article 12 (1), to reject all remaining tenders.

(8) Information relating to the examination, clarification, evaluation and comparison of tenders shall not be disclosed to suppliers or contractors or to any other person not involved officially in the examination, evaluation or comparison of tenders or in the decision on which tender should be accepted, except as provided in article 11.

* * *

Article 35. Prohibition of negotiations with suppliers or contractors

No negotiations shall take place between the procuring entity and a supplier or contractor with respect to a tender submitted by the supplier or contractor.

* * *

Article 36. Acceptance of tender and entry into force of procurement contract

(1) Subject to articles 12 and 34 (7), the tender that has been ascertained to be the successful tender pursuant to article 34 (4) (b) shall be accepted. Notice of acceptance of the tender shall be given promptly to the supplier or contractor submitting the tender.

(2) (a) Notwithstanding the provisions of paragraph (4) of this article, the solicitation documents may require the supplier or contractor whose tender has been accepted to sign a written procurement contract conforming to the tender. In such cases, the procuring entity (the requesting ministry) and the supplier or contractor shall sign the procurement contract within a reasonable period of time after the notice referred to in paragraph (1) of this article is dispatched to the supplier or contractor;

(b) Subject to paragraph (3) of this article, where a written procurement contract is required to be signed pursuant to subparagraph (a) of this paragraph, the procurement contract enters into force when the contract is signed by the supplier or contractor and by the procuring entity. Between the time when the notice referred to in paragraph (1) of this article is dispatched to the supplier or contractor and the entry into force of the procurement contract, neither the procuring entity nor the supplier or contractor shall take any action that interferes with the entry into force of the procurement contract or with its performance.

(3) Where the solicitation documents stipulate that the procurement contract is subject to approval by a higher authority, the procurement contract shall not enter into force before the approval is given. The solicitation documents shall specify the estimated period of time following dispatch of the notice of acceptance of the tender that will be required to obtain the approval. A failure to obtain the approval within the time specified in the solicitation documents shall not extend the period of effectiveness of tenders specified in the solicitation documents pursuant to article 31 (1) or the period of effectiveness of tender securities that may be required pursuant to article 32 (1).

(4) Except as provided in paragraphs (2) (b) and (3) of this article, a procurement contract in accordance with the terms and conditions of the accepted tender enters into force when the notice referred to in paragraph (1) of this article is dispatched to the supplier or contractor that submitted the tender, provided that it is dispatched while the tender is in force. The notice is dispatched when it is properly addressed or otherwise directed and transmitted to the supplier or contractor, or conveyed to an appropriate authority for transmission to the supplier or contractor, by a mode authorized by article 9.

(5) If the supplier or contractor whose tender has been accepted fails to sign a written procurement contract, if required to do so, or fails to provide any required security for the performance of the contract, the procuring entity shall select a successful tender in accordance with article 34 (4) from among the remaining tenders that are in force, subject to the right of the procuring entity, in accordance with article 12 (1), to reject all remaining tenders. The notice provided for in paragraph (1) of this article shall be given to the supplier or contractor that submitted that tender.

(6) Upon the entry into force of the procurement contract and, if required, the provision by the supplier or contractor of a security for the performance of the contract, notice of the procurement contract shall be given to other suppliers or contractors, specifying the name and address of the supplier or contractor that has entered into the contract and the contract price.

* * *

CHAPTER IV. PRINCIPAL METHOD FOR PROCUREMENT OF SERVICES

Article 37. Notice of solicitation of proposals

(1) A procuring entity shall solicit proposals for services or, where applicable, applications to prequalify by causing a notice seeking expression of interest in submitting a proposal or in prequalifying, as the case may be, to be published in ... (the enacting State specifies the official gazette or other official publication in which the notice is to be published). The notice shall contain, at a minimum, the name and address of the procuring entity, a brief description of the services to be procured, the means of obtaining the request for proposals or prequalification documents and the price, if any, charged for the request for proposals or for the prequalification documents.

(2) The notice shall also be published, in a language customarily used in international trade, in a newspaper of wide international circulation or in a relevant trade or professional publication of wide international circulation except where participation is limited solely to domestic suppliers or contractors pursuant to article 8 (1) or where, in view of the low value of the

services to be procured, the procuring entity decides that only domestic suppliers or contractors are likely to be interested in submitting proposals.

(3) (Subject to approval by ... (the enacting State designates an organ to issue the approval),) where direct solicitation is necessary for reasons of economy and efficiency, the procuring entity need not apply the provisions of paragraphs (1) and (2) of this article in a case where:

(a) The services to be procured are available only from a limited number of suppliers or contractors, provided that it solicits proposals from all those suppliers or contractors; or

(b) The time and cost required to examine and evaluate a large number of proposals would be disproportionate to the value of the services to be procured, provided that it solicits proposals from a sufficient number of suppliers or contractors to ensure effective competition; or

(c) Direct solicitation is the only means of ensuring confidentiality or is required by reason of the national interest, provided that it solicits proposals from a sufficient number of suppliers or contractors to ensure effective competition.

(4) The procuring entity shall provide the request for proposals, or the prequalification documents, to suppliers or contractors in accordance with the procedures and requirements specified in the notice or, in cases in which paragraph (3) applies, directly to participating suppliers or contractors. The price that the procuring entity may charge for the request for proposals or the prequalification documents shall reflect only the cost of printing and providing them to suppliers or contractors. If prequalification proceedings have been engaged in, the procuring entity shall provide the request for proposals to each supplier or contractor that has been prequalified and that pays the price charged, if any.

* * *

Article 38. Contents of requests for proposals for services

The request for proposals shall include, at a minimum, the following information:

(a) The name and address of the procuring entity;

(b) The language or languages in which proposals are to be prepared;

(c) The manner, place and deadline for the submission of proposals;

(d) If the procuring entity reserves the right to reject all proposals, a statement to that effect;

(e) The criteria and procedures, in conformity with the provisions of article 6, relative to the evaluation of the qualifications of suppliers or contractors and relative to the further demonstration of qualifications pursuant to article 7 (8);

(f) The requirements as to documentary evidence or other information that must be submitted by suppliers or contractors to demonstrate their qualifications;

(g) The nature and required characteristics of the services to be procured to the extent known, including, but not limited to, the location where the services are to be provided and the desired or required time, if any, when the services are to be provided;

(h) Whether the procuring entity is seeking proposals as to various possible ways of meeting its needs;

(i) If suppliers or contractors are permitted to submit proposals for only a portion of the services to be procured, a description of the portion or portions for which proposals may be submitted;

(j) The currency or currencies in which the proposal price is to be formulated or expressed, unless the price is not a relevant criterion;

(k) The manner in which the proposal price is to be formulated or expressed, including a statement as to whether the price is to cover elements other than the cost of the services, such as reimbursement for transportation, lodging, insurance, use of equipment, duties or taxes, unless the price is not a relevant criterion;

(l) The procedure selected pursuant to article 41 (1) for ascertaining the successful proposal;

(m) The criteria to be used in determining the successful proposal, including any margin of preference to be used pursuant to article 39 (2), and the relative weight of such criteria;

(n) The currency that will be used for the purpose of evaluating and comparing proposals, and either the exchange rate that will be used for the conversion of proposal prices into that currency or a statement that the rate published by a specified financial institution prevailing on a specified date will be used;

(o) If alternatives to the characteristics of the services, contractual terms and conditions or other requirements set forth in the request for proposals are permitted, a statement to that effect and a description of the manner in which alternative proposals are to be evaluated and compared;

(p) The name, functional title and address of one or more officers or employees of the procuring entity who are authorized to communicate directly with and to receive communications directly from suppliers or contractors in connection with the procurement proceedings, without the intervention of an intermediary;

(q) The means by which, pursuant to article 40, suppliers or contractors may seek clarifications of the request for proposals, and a statement as to whether the procuring entity intends, at this stage, to convene a meeting of suppliers or contractors;

(r) The terms and conditions of the procurement contract, to the extent that they are already known to the procuring entity, and the contract form, if any, to be signed by the parties;

(s) References to this Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings, provided, however, that the omission of any such reference shall not constitute grounds for review under article 52 or give rise to liability on the part of the procuring entity;

(t) Notice of the right provided under article 52 to seek review of an unlawful act or decision of, or procedure followed by, the procuring entity in relation to the procurement proceedings;

(u) Any formalities that will be required once the proposal has been accepted for a procurement contract to enter into force, including, where applicable, the execution of a written procurement contract, and approval by a higher authority or the Government and the estimated period of time following dispatch of the notice of acceptance that will be required to obtain the approval;

(v) Any other requirements established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and submission of proposals and to other aspects of the procurement proceedings.

* * *

Article 39. Criteria for the evaluation of proposals

(1) The procuring entity shall establish criteria for evaluating the proposals and determine the relative weight to be accorded to each such criterion and the manner in which they are to be applied in the evaluation of proposals. Those criteria shall be notified to suppliers or contractors in the request for proposals and may concern only the following:

(a) The qualifications, experience, reputation, reliability and professional and managerial competence of the supplier or contractor and of the personnel to be involved in providing the services;

(b) The effectiveness of the proposal submitted by the supplier or contractor in meeting the needs of the procuring entity;

(c) The proposal price, subject to any margin of preference applied pursuant to paragraph (2), including any ancillary or related costs;

(d) The effect that the acceptance of a proposal will have on the balance of payments position and foreign exchange reserves of [this State], the extent of participation by local suppliers and contractors, the economic development potential offered by the proposal, including domestic investment or other business activity, the encouragement of employment, the transfer of technology, the development of managerial, scientific and operational skills and the countertrade arrangements offered by suppliers or contractors (... (the enacting State may expand subparagraph (d) by including additional criteria));

(e) National defence and security considerations.

(2) If authorized by the procurement regulations (and subject to approval by ... (each State designates an organ to issue the approval),) in evaluating and comparing the proposals, a procuring entity may grant a margin of preference for the benefit of domestic suppliers of services, which shall be calculated in

accordance with the procurement regulations and reflected in the record of the procurement proceedings.

* * *

Article 40. Clarification and modification of requests for proposals

(1) A supplier or contractor may request a clarification of the request for proposals from the procuring entity. The procuring entity shall respond to any request by a supplier or contractor for clarification of the request for proposals that is received by the procuring entity within a reasonable time prior to the deadline for the submission of proposals. The procuring entity shall respond within a reasonable time so as to enable the supplier or contractor to make a timely submission of its proposal and shall, without identifying the source of the request, communicate the clarification to all suppliers or contractors to which the procuring entity has provided the request for proposals.

(2) At any time prior to the deadline for submission of proposals, the procuring entity may, for any reason, whether on its own initiative or as a result of a request for clarification by a supplier or contractor, modify the request for proposals by issuing an addendum. The addendum shall be communicated promptly to all suppliers or contractors to which the procuring entity has provided the request for proposals and shall be binding on those suppliers or contractors.

(3) If the procuring entity convenes a meeting of suppliers or contractors, it shall prepare minutes of the meeting containing the requests submitted at the meeting for clarification of the request for proposals, and its responses to those requests, without identifying the sources of the requests. The minutes shall be provided promptly to all suppliers or contractors participating in the procurement proceedings, so as to enable those suppliers or contractors to take the minutes into account in preparing their proposals.

* * *

Article 41. Choice of selection procedure

(1) The procuring entity, in ascertaining the successful proposal, shall use the procedure provided for in article 42 (2) (a), 42 (2) (b), 43 or 44 that has been notified to suppliers or contractors in the request for proposals.

(2) The procuring entity shall include in the record required under article 11 a statement of the grounds and circumstances on which it relied to justify the use of a selection procedure pursuant to paragraph (1) of this article.

(3) Nothing in this chapter shall prevent the procuring entity from resorting to an impartial panel of external experts in the selection procedure.

* * *

Article 42. Selection procedure without negotiation

(1) Where the procuring entity, in accordance with article 41 (1), uses the procedure provided for in this article, it shall establish a threshold with respect to quality and technical aspects of the proposals in accordance with the criteria other than price as set out in the request for proposals and rate each

proposal in accordance with such criteria and the relative weight and manner of application of those criteria as set forth in the request for proposals. The procuring entity shall then compare the prices of the proposals that have attained a rating at or above the threshold.

(2) The successful proposal shall then be:

(a) The proposal with the lowest price; or

(b) The proposal with the best combined evaluation in terms of the criteria other than price referred to in paragraph (1) of this article and the price.

* * *

Article 43. Selection procedure with simultaneous negotiations

(1) Where the procuring entity, in accordance with article 41 (1), uses the procedure provided for in this article, it shall engage in negotiations with suppliers or contractors that have submitted acceptable proposals and may seek or permit revisions of such proposals, provided that the opportunity to participate in negotiations is extended to all such suppliers or contractors.

(2) Following completion of negotiations, the procuring entity shall request all suppliers or contractors remaining in the proceedings to submit, by a specified date, a best and final offer with respect to all aspects of their proposals.

(3) In the evaluation of proposals, the price of a proposal shall be considered separately and only after completion of the technical evaluation.

(4) Any award by the procuring entity shall be made to the supplier or contractor whose proposal best meets the needs of the procuring entity as determined in accordance with the criteria for evaluating the proposals as well as with the relative weight and manner of application of those criteria as set forth in the request for proposals.

* * *

Article 44. Selection procedure with consecutive negotiations

Where the procuring entity, in accordance with article 41 (1), uses the procedure provided for in this article, it shall engage in negotiations with suppliers and contractors in accordance with the following procedure:

(a) Establish a threshold in accordance with article 42 (1);

(b) Invite for negotiations on the price of its proposal the supplier or contractor that has attained the best rating in accordance with article 42 (1);

(c) Inform the suppliers or contractors that attained ratings above the threshold that they may be considered for negotiation if the negotiations with the suppliers or contractors with better ratings do not result in a procurement contract;

(d) Inform the other suppliers or contractors that they did not attain the required threshold;

(e) If it becomes apparent to the procuring entity that the negotiations with the supplier or contractor invited pursuant to subparagraph (b) of this article will not result in a procurement contract, inform that supplier or contractor that it is terminating the negotiations;

(f) The procuring entity shall then invite for negotiations the supplier or contractor that attained the second best rating; if the negotiations with that supplier or contractor do not result in a procurement contract, the procuring entity shall invite the other suppliers or contractors for negotiations on the basis of their ranking until it arrives at a procurement contract or rejects all remaining proposals.

* * *

Article 45. Confidentiality

The procuring entity shall treat proposals in such a manner as to avoid the disclosure of their contents to competing suppliers or contractors. Any negotiations pursuant to article 43 or 44 shall be confidential and, subject to article 11, one party to the negotiations shall not reveal to any other person any technical, price or other information relating to the negotiations without the consent of the other party.

* * *

CHAPTER V. PROCEDURES FOR ALTERNATIVE METHODS OF PROCUREMENT

Article 46. Two-stage tendering

(1) The provisions of chapter III of this Law shall apply to two-stage tendering proceedings except to the extent those provisions are derogated from in this article.

(2) The solicitation documents shall call upon suppliers or contractors to submit, in the first stage of the two-stage tendering proceedings, initial tenders containing their proposals without a tender price. The solicitation documents may solicit proposals relating to the technical, quality or other characteristics of the goods, construction or services as well as to contractual terms and conditions of supply, and, where relevant, the professional and technical competence and qualifications of the suppliers or contractors.

(3) The procuring entity may, in the first stage, engage in negotiations with any supplier or contractor whose tender has not been rejected pursuant to articles 12, 15 or 34 (3) concerning any aspect of its tender.

(4) In the second stage of the two-stage tendering proceedings, the procuring entity shall invite suppliers or contractors whose tenders have not been rejected to submit final tenders with prices with respect to a single set of specifications. In formulating those specifications, the procuring entity may delete or modify any aspect, originally set forth in the solicitation documents, of the technical or quality characteristics of the goods, construction or services to be procured, and any criterion originally set forth in those documents for evaluating and comparing tenders and for ascertaining the successful tender, and may add new characteristics or criteria that conform with this Law. Any such deletion, modification or addition shall be communicated to suppliers or contractors in the invitation to submit final tenders. A supplier

or contractor not wishing to submit a final tender may withdraw from the tendering proceedings without forfeiting any tender security that the supplier or contractor may have been required to provide. The final tenders shall be evaluated and compared in order to ascertain the successful tender as defined in article 34 (4) (b).

* * *

Article 47. Restricted tendering

(1) (a) When the procuring entity engages in restricted tendering on the grounds referred to in article 20 (a), it shall solicit tenders from all suppliers and contractors from whom the goods, construction or services to be procured are available;

(b) When the procuring entity engages in restricted tendering on the grounds referred to in article 20 (b), it shall select suppliers or contractors from whom to solicit tenders in a non-discriminatory manner and it shall select a sufficient number of suppliers or contractors to ensure effective competition.

(2) When the procuring entity engages in restricted tendering, it shall cause a notice of the restricted-tendering proceeding to be published in ... (each enacting State specifies the official gazette or other official publication in which the notice is to be published).

(3) The provisions of chapter III of this Law, except article 24, shall apply to restricted-tendering proceedings, except to the extent that those provisions are derogated from in this article.

* * *

Article 48. Request for proposals

(1) Requests for proposals shall be addressed to as many suppliers or contractors as practicable, but to at least three, if possible.

(2) The procuring entity shall publish in a newspaper of wide international circulation or in a relevant trade publication or technical or professional journal of wide international circulation a notice seeking expressions of interest in submitting a proposal, unless for reasons of economy or efficiency the procuring entity considers it undesirable to publish such a notice; the notice shall not confer any rights on suppliers or contractors, including any right to have a proposal evaluated.

(3) The procuring entity shall establish the criteria for evaluating the proposals and determine the relative weight to be accorded to each such criterion and the manner in which they are to be applied in the evaluation of the proposals. The criteria shall concern:

(a) The relative managerial and technical competence of the supplier or contractor;

(b) The effectiveness of the proposal submitted by the supplier or contractor in meeting the needs of the procuring entity; and

(c) The price submitted by the supplier or contractor for carrying out its proposal and the cost of operating, maintaining and repairing the proposed goods or construction.

(4) A request for proposals issued by a procuring entity shall include at least the following information:

(a) The name and address of the procuring entity;

(b) A description of the procurement need including the technical and other parameters to which the proposal must conform, as well as, in the case of procurement of construction, the location of any construction to be effected and, in the case of services, the location where they are to be provided;

(c) The criteria for evaluating the proposal, expressed in monetary terms to the extent practicable, the relative weight to be given to each such criterion and the manner in which they will be applied in the evaluation of the proposal; and

(d) The desired format and any instructions, including any relevant timetables applicable in respect of the proposal.

(5) Any modification or clarification of the request for proposals, including modification of the criteria for evaluating proposals referred to in paragraph (3) of this article, shall be communicated to all suppliers or contractors participating in the request-for-proposals proceedings.

(6) The procuring entity shall treat proposals in such a manner so as to avoid the disclosure of their contents to competing suppliers or contractors.

(7) The procuring entity may engage in negotiations with suppliers or contractors with respect to their proposals and may seek or permit revisions of such proposals, provided that the following conditions are satisfied:

(a) Any negotiations between the procuring entity and a supplier or contractor shall be confidential;

(b) Subject to article 11, one party to the negotiations shall not reveal to any other person any technical, price or other market information relating to the negotiations without the consent of the other party;

(c) The opportunity to participate in negotiations is extended to all suppliers or contractors that have submitted proposals and whose proposals have not been rejected.

(8) Following completion of negotiations, the procuring entity shall request all suppliers or contractors remaining in the proceedings to submit, by a specified date, a best and final offer with respect to all aspects of their proposals.

(9) The procuring entity shall employ the following procedures in the evaluation of proposals:

(a) Only the criteria referred to in paragraph (3) of this article as set forth in the request for proposals shall be considered;

(b) The effectiveness of a proposal in meeting the needs of the procuring entity shall be evaluated separately from the price;

(c) The price of a proposal shall be considered by the procuring entity only after completion of the technical evaluation.

(10) Any award by the procuring entity shall be made to the supplier or contractor whose proposal best meets the needs of the procuring entity as determined in accordance with the criteria for evaluating the proposals set forth in the request for proposals, as well as with the relative weight and manner of application of those criteria indicated in the request for proposals.

* * *

Article 49. Competitive negotiation

(1) In competitive negotiation proceedings, the procuring entity shall engage in negotiations with a sufficient number of suppliers or contractors to ensure effective competition.

(2) Any requirements, guidelines, documents, clarifications or other information relative to the negotiations that are communicated by the procuring entity to a supplier or contractor shall be communicated on an equal basis to all other suppliers or contractors engaging in negotiations with the procuring entity relative to the procurement.

(3) Negotiations between the procuring entity and a supplier or contractor shall be confidential, and, except as provided in article 11, one party to those negotiations shall not reveal to any other person any technical, price or other market information relating to the negotiations without the consent of the other party.

(4) Following completion of negotiations, the procuring entity shall request all suppliers or contractors remaining in the proceedings to submit, by a specified date, a best and final offer with respect to all aspects of their proposals. The procuring entity shall select the successful offer on the basis of such best and final offers.

* * *

Article 50. Request for quotations

(1) The procuring entity shall request quotations from as many suppliers or contractors as practicable, but from at least three, if possible. Each supplier or contractor from whom a quotation is requested shall be informed whether any elements other than the charges for the goods or services themselves, such as any applicable transportation and insurance charges, customs duties and taxes, are to be included in the price.

(2) Each supplier or contractor is permitted to give only one price quotation and is not permitted to change its quotation. No negotiations shall take place between the procuring entity and a supplier or contractor with respect to a quotation submitted by the supplier or contractor.

(3) The procurement contract shall be awarded to the supplier or contractor that gave the lowest-priced quotation meeting the needs of the procuring entity.

* * *

Article 51. Single-source procurement

In the circumstances set forth in article 22 the procuring entity may procure the goods, construction or services by soliciting a proposal or price quotation from a single supplier or contractor.

CHAPTER VI. REVIEW*

Article 52. Right to review

(1) Subject to paragraph (2) of this article, any supplier or contractor that claims to have suffered, or that may suffer, loss or injury due to a breach of a duty imposed on the procuring entity by this Law may seek review in accordance with articles 53 to [57].

(2) The following shall not be subject to the review provided for in paragraph (1) of this article:

(a) The selection of a method of procurement pursuant to articles 18 to 22;

(b) The choice of a selection procedure pursuant to article 41 (1);

(c) The limitation of procurement proceedings in accordance with article 8 on the basis of nationality;

(d) A decision by the procuring entity under article 12 to reject all tenders, proposals, offers or quotations;

(e) A refusal by the procuring entity to respond to an expression of interest in participating in request-for-proposals proceedings pursuant to article 48 (2);

(f) An omission referred to in article 27 (t) or article 38 (s).

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* States enacting the Model Law may wish to incorporate the articles on review without change or with only such minimal changes as are necessary to meet particular important needs. However, because of constitutional or other considerations, States might not, to one degree or another, see fit to incorporate those articles. In such cases, the articles on review may be used to measure the adequacy of existing review procedures.

Article 53. Review by procuring entity (or by approving authority)

(1) Unless the procurement contract has already entered into force, a complaint shall, in the first instance, be submitted in writing to the head of the procuring entity. (However, if the complaint is based on an act or decision of, or procedure followed by, the procuring entity, and that act, decision or procedure was approved by an authority pursuant to this Law, the complaint shall instead be submitted to the head of the authority that approved the act, as the case may be.)

(2) The head of the procuring entity (or of the approving authority) shall not entertain a complaint, unless it was submitted within 20 days of when the supplier or contractor submitting it became aware of the circumstances giving rise to the complaint or of when that supplier or contractor should have become aware of those circumstances, whichever is earlier.

(3) The head of the procuring entity (or of the approving authority) need not entertain a complaint, or continue to entertain a complaint, after the procurement contract has entered into force.

(4) Unless the complaint is resolved by mutual agreement of the supplier or contractor that submitted it and the procuring entity, the head of the procuring entity (or of the approving authority) shall, within 30 days after the submission of the complaint, issue a written decision. The decision shall:

(a) State the reasons for the decision; and

(b) If the complaint is upheld in whole or in part, indicate the corrective measures that are to be taken.

(5) If the head of the procuring entity (or of the approving authority) does not issue a decision by the time specified in paragraph (4) of this article, the supplier or contractor submitting the complaint (or the procuring entity) is entitled immediately thereafter to institute proceedings under article [54 or 57]. Upon the institution of such proceedings, the competence of the head of the procuring entity (or of the approving authority) to entertain the complaint ceases.

(6) The decision of the head of the procuring entity (or of the approving authority) shall be final unless proceedings are instituted under article [54 or 57].

* * *

Article 54. Administrative review*

(1) A supplier or contractor entitled under article 52 to seek review may submit a complaint to [insert name of administrative body]:

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* States where hierarchical administrative review of administrative actions, decisions and procedures is not a feature of the legal system may omit article 54 and provide only for judicial review (article 57).

(a) If the complaint cannot be submitted or entertained under article 53 because of the entry into force of the procurement contract, and provided that the complaint is submitted within 20 days after the earlier of the time when the supplier or contractor submitting it became aware of the circumstances giving rise to the complaint or the time when that supplier or contractor should have become aware of those circumstances;

(b) If the head of the procuring entity does not entertain the complaint because the procurement contract has entered into force, provided that the complaint is submitted within 20 days after the issuance of the decision not to entertain the complaint;

(c) Pursuant to article 53 (5), provided that the complaint is submitted within 20 days after the expiry of the period referred to in article 53 (4); or

(d) If the supplier or contractor claims to be adversely affected by a decision of the head of the procuring entity (or of the approving authority) under article 53, provided that the complaint is submitted within 20 days after the issuance of the decision.

(2) Upon receipt of a complaint, the [insert name of administrative body] shall give notice of the complaint promptly to the procuring entity (or to the approving authority).

(3) The [insert name of administrative body] may [grant] [recommend]* one or more of the following remedies, unless it dismisses the complaint:

(a) Declare the legal rules or principles that govern the subject-matter of the complaint;

(b) Prohibit the procuring entity from acting or deciding unlawfully or from following an unlawful procedure;

(c) Require the procuring entity that has acted or proceeded in an unlawful manner, or that has reached an unlawful decision, to act or to proceed in a lawful manner or to reach a lawful decision;

(d) Annul in whole or in part an unlawful act or decision of the procuring entity, other than any act or decision bringing the procurement contract into force;

(e) Revise an unlawful decision by the procuring entity or substitute its own decision for such a decision, other than any decision bringing the procurement contract into force;

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* Optional language is presented in order to accommodate those States where review bodies do not have the power to grant the remedies listed below but can make recommendations.

(f) Require the payment of compensation for

Option I

Any reasonable costs incurred by the supplier or contractor submitting the complaint in connection with the procurement proceedings as a result of an unlawful act or decision of, or procedure followed by, the procuring entity;

Option II

Loss or injury suffered by the supplier or contractor submitting the complaint in connection with the procurement proceedings;

(g) Order that the procurement proceedings be terminated.

(4) The [insert name of administrative body] shall within 30 days issue a written decision concerning the complaint, stating the reasons for the decision and the remedies granted, if any.

(5) The decision shall be final unless an action is commenced under article 57.

* * *

Article 55. Certain rules applicable to review proceedings under article 53 [and article 54]

(1) Promptly after the submission of a complaint under article 53 [or article 54], the head of the procuring entity (or of the approving authority) [, or the [insert name of administrative body], as the case may be,] shall notify all suppliers or contractors participating in the procurement proceedings to which the complaint relates of the submission of the complaint and of its substance.

(2) Any such supplier or contractor or any governmental authority whose interests are or could be affected by the review proceedings has a right to participate in the review proceedings. A supplier or contractor that fails to participate in the review proceedings is barred from subsequently making the same type of claim.

(3) A copy of the decision of the head of the procuring entity (or of the approving authority) [, or of the [insert name of administrative body], as the case may be,] shall be furnished within five days after the issuance of the decision to the supplier or contractor submitting the complaint, to the procuring entity and to any other supplier or contractor or governmental authority that has participated in the review proceedings. In addition, after the decision has been issued, the complaint and the decision shall be promptly made available for inspection by the general public, provided, however, that no information shall be disclosed if its disclosure would be contrary to law, would impede law enforcement, would not be in the public interest, would prejudice legitimate commercial interests of the parties or would inhibit fair competition.

* * *

Article 56. Suspension of procurement proceedings

(1) The timely submission of a complaint under article 53 [or article 54] suspends the procurement proceedings for a period of seven days, provided that the complaint is not frivolous and contains a declaration the contents of which, if proven, demonstrate that the supplier or contractor will suffer irreparable injury in the absence of a suspension, it is probable that the complaint will succeed and the granting of the suspension would not cause disproportionate harm to the procuring entity or to other suppliers or contractors.

(2) When the procurement contract enters into force, the timely submission of a complaint under article 54 shall suspend performance of the procurement contract for a period of seven days, provided the complaint meets the requirements set forth in paragraph (1) of this article.

(3) The head of the procuring entity (or of the approving authority) [, or the [insert name of administrative body],] may extend the suspension provided for in paragraph (1) of this article, [and the [insert name of administrative body] may extend the suspension provided for in paragraph (2) of this article,] in order to preserve the rights of the supplier or contractor submitting the complaint or commencing the action pending the disposition of the review proceedings, provided that the total period of suspension shall not exceed 30 days.

(4) The suspension provided for by this article shall not apply if the procuring entity certifies that urgent public interest considerations require the procurement to proceed. The certification, which shall state the grounds for the finding that such urgent considerations exist and which shall be made a part of the record of the procurement proceedings, is conclusive with respect to all levels of review except judicial review.

(5) Any decision by the procuring entity under this article and the grounds and circumstances therefor shall be made part of the record of the procurement proceedings.

* * *

Article 57. Judicial review

The [insert name of court or courts] has jurisdiction over actions pursuant to article 52 and petitions for judicial review of decisions made by review bodies, or of the failure of those bodies to make a decision within the prescribed time-limit, under article 53 [or 54].

* * *

ANNEX II

List of documents before the Commission at its twenty-seventh session

A. General series

A/CN.9/383	Provisional agenda
A/CN.9/384	UNCITRAL Model Law on International Credit Transfers
A/CN.9/385	United Nations Convention on the Liability of Operators of Transport Terminals in International Trade
A/CN.9/386	United Nations Convention on International Bills of Exchange and International Promissory Notes
A/CN.9/387	Report of the Working Group on Electronic Data Interchange on the work of its twenty-sixth session
A/CN.9/388	Report of the Working Group on International Contract Practices on the work of its twentieth session
A/CN.9/389	Report of the Working Group on the New International Economic Order on the work of its sixteenth session
A/CN.9/390	Report of the Working Group on Electronic Data Interchange on the work of its twenty-seventh session
A/CN.9/391	Report of the Working Group on International Contract Practices on the work of its twenty-first session
A/CN.9/392	Report of the Working Group on the New International Economic Order on the work of its seventeenth session
A/CN.9/393	Procurement: Guide to Enactment of UNCITRAL Model Law on Procurement of Goods and Construction
A/CN.9/394	Procurement: draft amendments to the Guide to Enactment of UNCITRAL Model Law on Procurement of Goods and Construction
A/CN.9/395	Uniform Customs and Practice for Documentary Credits
A/CN.9/396	International commercial arbitration: draft Guidelines for Preparatory Conferences in Arbitral Proceedings
A/CN.9/397	Possible future work: legal aspects of receivables financing
A/CN.9/398	Cross-border insolvency: report on UNCITRAL-INSOL Colloquium
A/CN.9/399	Possible future work: build-operate-transfer projects
A/CN.9/400	Training and technical assistance

A/CN.9/401	Status of Conventions
A/CN.9/401/Add.1	Status of Conventions. Addendum. Status of the Hamburg Rules
A/CN.9/402	Bibliography of recent writings related to the work of UNCITRAL

B. Restricted series

A/CN.9/XXVII/CRP.1 and Add.1-13	Draft report of the United Nations Commission on International Trade Law on the work of its twenty-seventh session
A/CN.9/XXVII/CRP.2	Report of the drafting group
A/CN.9/XXVII/CRP.3	Draft paragraphs for the Guide to Enactment of the UNCITRAL Model Law on Procurement of Goods, Construction and Services
A/CN.9/XXVII/CRP.4	ICC Uniform Customs and Practice for Documentary Credits (UCP 500)
A/CN.9/XXVII/CRP.5	Adoption of the Model Law and recommendation: draft resolution